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Abstract

No. 10951

Agenda 22

FILED

AUG 2 - 1956

JULIUS R. RICHARDSON
CLERK, PROTEMPORE
Appellate Court Second District

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1956

2d
I.A. 65

MILDRED B. WHITE,

Plaintiff-Appellant,

vs.

OSCAR ENNENGA,

Defendant-Appellee.

)
)
) Appeal from
) Circuit Court of
) Winnebago County.
)
)

ROVALDI, J.

The plaintiff was a tenant in the defendant's apartment building. She brought this action to recover damages for injuries sustained in a fall on a common stairway in the building, alleging negligence of the defendant in failing to maintain the stairway in a reasonably safe condition. The jury returned a verdict for the plaintiff for \$4,000.00, and answered defendant's special interrogatories in plaintiff's favor. The court entered a judgment notwithstanding the verdict and also granted defendant's motion for new trial, from which judgment and order this appeal has been taken.

The court overturned the verdict of the jury on the grounds of assumption of risk, contributory negligence, absence

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AUG 5 - 1956

JULIUS R. RICHARDSON
CLERK, PROBATE
Appellate Court Second District

30 A. 62

of proof of any latent defect, and absence of proof of how the fall occurred. The plaintiff's theory of the case is that all such questions, if applicable in the case, were questions of fact for the jury which were resolved by the verdict in favor of the plaintiff and the answers to defendant's special interrogatories.

Defendant's theory is that the circumstantial evidence in the case as to the condition of the landing in question before and after the accident was wholly insufficient in law and in fact upon which to base a finding as to the proximate cause of the plaintiff's fall; and that even if her fall was caused by some condition of the stairs or tread, the evidence was uncontradicted that plaintiff had full prior knowledge of such condition, had personally made repairs where necessary to the stairs in question, and that she assumed the risk, if any, of the condition thereof, and that she was guilty of contributory negligence as a matter of law.

The accident occurred January 22, 1954. The plaintiff, then forty-nine years of age, made her home in the apartment building owned by the defendant at 2302 Auburn Street, Rockford, where she had lived for some fifteen years. The building contained four apartments, two on each floor, running north and south. She occupied the east apartment on the second floor.

There were two entrances to the building, one at the front and one at the back, with stairways to the second floor at each entrance. Plaintiff, as well as the other

second floor tenants, habitually used the stairway at the rear because of its proximity to the kitchen area and to the common garage at the rear of the building (over which garage was a fifth apartment). The rear stairway was also commonly used by guests of the plaintiff.

The back or rear stairway (which we shall refer to as "the stairway" because it is the only one involved) was divided into two sections connected by a landing. Going from the rear door of her apartment, the plaintiff walked a few feet south to the upper staircase, then turned north and went down ten steps to the first floor landing. The stairway was steep. There were no handrails on either side.

The stairs and intermediate landing were partially covered by mats or treads, which were approximately fifteen inches in width and extended over the nose of the stairs. They were a cheap material of thin plastic or rubber, placed on the stairs twelve to eighteen months before the accident by the janitor, Charles Heinsroth. All of the testimony, and the photographs taken by the defendant before their removal, showed that they were worn and cracked, with holes and gaps and portions torn away from the nails or treads which held them in place.

The plaintiff testified that the treads had become torn and damaged by children in the building soon after they were put on the stairs; that she had complained repeatedly to the janitor, Charles Heinsroth, who had worked in the building about thirteen years up until he became ill a year or so previously, and on occasion to the building agent, Mr. Lewis, of the firm of

Collins & Levis. Plaintiff testified, "One time I told Mr. Levis that I couldn't understand how the owner of a building would want their tenants to live in a building like that, and Mr. Levis said that if I wasn't careful I would be given a thirty-day notice." She further testified that nothing had been done by the defendant or his agents to correct the condition; that some months previous, she herself had tacked down or flattened out places on some of the lower stairways when nothing was done about them, but had never done anything about the upstairs or landing from which the fall occurred.

On the day of the accident she came home about 5:00 o'clock and went to her apartment by the front entrance where she had been let out by the person with whom she had been riding. It was rainy and wet, so she decided to change her clothes into something more comfortable, and put on a house-dress and a pair of knit slippers. She had a metal wastebasket in her apartment which was full, and after knocking it over while talking on the telephone, she decided to empty it downstairs. She went out of the back door of her apartment into the hallway with the wastebasket under her left arm, walked down the steps to the intermediate landing and turned to go down the lower stairway. As she stepped from the landing, her left foot caught on something and she fell down the stairs to the small areaway below.

She stated that she was walking in the center of the stairs; that she wasn't in a hurry and could see where she was walking; that as she started to take a step from the

landing to the stairs below, her foot caught, there was nothing to hang onto, and she fell forward, striking against the doorway of the first floor apartment; that her foot caught either on one of the torn places in the mat or on a nail, she couldn't say which. The slippers which plaintiff was wearing, and which had been removed and not worn since, had a tear in the bottom of the left slipper which had not been there before.

Joan Krischel, who stayed with the plaintiff from time to time and took care of her after the accident, testified that she had inspected the stairs and landing twice on the day following the accident before the treads were removed, the first time at 6:30 in the morning; that there was a protruding nail near the middle of the landing stair.

Edna L. Brooks testified for plaintiff that she had occasion to visit plaintiff at the apartment very often; that she was there just before she left for Florida about, but not sure, January 15; that she always parked her car in back and came in the rear entrance; that she observed the condition of the tread on top of the steps leading up from the first floor from time to time; that it was ragged, torn; that it was in very poor condition, torn, jagged, with holes in it.

Esther Lund testified for plaintiff that she had occasion to visit her in the apartment from time to time and had been there about three weeks before the accident; that she had occasion to observe the tread on the landing at the head of the flight of stairs leading up from the first floor to the landing and that the condition of that tread was

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torn and jagged and overlapped the stairs, extending over the nose of the step or stair at that point. On cross-examination, she testified, "I remember that landing, stair tread; it was torn and had a jagged edge, pieces were torn out of the edge. It seemed it was too big for the step, it stuck over the edge some. It was poorly nailed, I would say. The only thing I noticed about the tread was the jagged edge. Every time I went there I could see it."

The plaintiff's leg was fractured in the knee joint and she sustained other injuries as the result of the fall. The treating doctor, an orthopedic specialist, testified to care and treatment of the leg, the necessity of insertion of the three inch nail and screw, which still remained in the joint. He stated the leg had healed reasonably satisfactorily, but that a traumatic arthritis had developed which, in his opinion, would be permanent; that any changes would be progressively for the worse and not for the better; that plaintiff's continuing reports of pain and discomfort were genuine. The plaintiff testified to her inability to use the leg properly, the pain which still accompanied its use, her difficulty in getting up and down stairs, and her inability to bowl which affected her work as well as her other activities. The plaintiff's special damages were approximately \$2,000.00.

Where the landlord retains control over premises used in common by his tenants, he has the duty of exercising reasonable care to keep the premises in a reasonably safe condition, and is liable for an injury occasioned by his failure so to do. *Murphy v. Illinois State Trust Co.*, 375 Ill. 310, 313; *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 487, 491;

Holsman v. Darling State Street Corp., 6 Ill. App. 2d 517, 521.
In Murphy v. Illinois State Trust Co., supra, the court said at
pages 313-314:

"The rule is that where only a portion of the premises is rented and the landlord retains control of other parts of the same such as stairways, passageways, or cellarways, or where he rents the premises to several tenants, retaining control over a part of the same for the common use of the several tenants, he has the duty of exercising reasonable care to keep the premises in a reasonably safe condition and he is liable for an injury which results to persons, lawfully in such place, from failure to perform such duty. Shoninger Co. v. Mann, 219 Ill. 242."

As previously pointed out, plaintiff had complained repeatedly to the janitor and on occasion to the building agent, but nothing had been done by the defendant or his agents to correct the condition. The defendant himself testified that he had seen the condition of the stairs just two weeks prior to the accident, so he clearly had ample notice as to the condition of the stairs.

Defendant contends that the circumstantial evidence in the case is wholly insufficient in law and in fact upon which to base a finding as to the proximate cause of the plaintiff's fall and that a jury cannot base its verdict on speculation or conjecture. Direct evidence of the cause of a mishap is not necessary in order to sustain a verdict for the plaintiff. Lindroth v. Walgreen Co., 407 Ill. 121, 133; Holsman v. Darling State Street Corp., supra, 523; Paolinelli v. Dainty Foods Mfg., Inc., 322 Ill. App. 586, 597; Devine v. Delano, 272 Ill. 166, 179. The plaintiff testified that she was walking carefully and looking where she was going, that her left foot caught on something on the step or landing, that she didn't know whether it was a torn tread or protruding

nail and that there was nothing to grab onto, and she fell. The defendant says, in effect, it must be positively determined that she either tripped on a nail or torn tread thus causing the fall. The court in *Lindroth v. Walgreen Co.*, supra, at 133, quoting from *Lavender v. Kurn*, 327 U. S. 645, said:

"Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

To the same effect is *Holsman v. Darling State Street Corp.*, supra, involving an injury to a tenant as a result of a fall on a stairway.

In the case of *Paolinelli v. Bainty Foods Mfg. Inc.*, supra, where it was a question whether the bone which caused the baby's death came from the defendant's soup or from somewhere else, the court stated at page 597, as follows:

"Plaintiff's case rests largely on circumstantial evidence. However, a verdict may be founded on circumstantial evidence alone. Negligence is always a question of fact that must be alleged and proved as averred. It cannot be supported by mere conjecture or surmise. We agree with defendant that liability cannot rest upon imagination, speculation or conjecture, or upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them. Absolute, positive, ocular proof the law wisely does not require. A greater or less probability, leading, on the whole, to a satisfactory conclusion, is all that can reasonably be expected to establish controverted facts."

Based on the condition of the stairway, the verdict of the jury was entirely reasonable in its finding that the plaintiff fell as a result of the defective stairs.

Defendant contends that where plaintiff knowingly exposed herself to a known and existing condition, knowing all of the risks incident thereto, and was injured thereby, she assumed the risk and was guilty of contributory negligence as a matter of law. The jury is entitled to weigh the evidence and draw reasonable inferences therefrom. The record discloses that when plaintiff went down the stairs, she put the basket under her left arm, and was holding onto the wall; that she was wearing knit slippers at the time, which fitted rather well on her feet; that they were not snug, but they were not loose; that they did not slip around. The jury saw and examined the slippers. Plaintiff testified that the protrusion or tear in the material in the toe of the slipper, identified as plaintiff's exhibit 6, was not there prior to the accident, and that the slippers were in the same condition at the trial as they were immediately after the accident, and that she had not worn them since that time; that the slippers did not come off after the accident, and that they were taken off after she was carried upstairs and put on the bed. Under the law, it was proper for the jury to consider these facts and circumstances, and to draw all reasonable inferences therefrom as to the direct and proximate cause of the accident and of plaintiff's injuries. *Minters v. Mid-City Management Corp.*, 331 Ill. App. 64, 71. The jury found in its answer to a special interrogatory submitted by defendant that the plaintiff was in the exercise of due care and caution for her own safety at and just prior to the occurrence in question. With this finding, we are in accord.

The trial court may only grant judgment notwithstanding-

ing the verdict if, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case, *Heideman v. Kelsey*, 414 Ill. 453, 457; *Paul v. C. & M. W. Ry. Co.*, 5 Ill. 2d 135, 140. In this case there was evidence to support the finding of the jury, and the trial court should not have granted judgment notwithstanding the verdict.

The verdict was not against the manifest weight of the evidence, and therefore, the trial court erred in granting the motion for new trial. *Stevenson v. Byrne*, 3 Ill. App. 2d 43. To be against the manifest weight of the evidence requires that an opposite conclusion be clearly evident. *Olin Industries, Inc. v. Wuellner*, 1 Ill. App. 2d 267, 271; *Schneiderman v. Interstate Transit Lines, Inc.*, 331 Ill. App. 143, 147. It is, therefore, our conclusion that the judgment of the circuit court of Winnebago County cannot be sustained.

The judgment of the circuit court of Winnebago County is, accordingly, reversed and judgment is entered in this court in favor of plaintiff and against defendant in the sum of \$4,000.00 and costs of suit.

Reversed, and judgment entered here.

Dove, P. J. Concurs

J. Crow
concurr.

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PAUL PLETKE,

Appellee,

v.

FRANK D. SHOBE,

Appellant.

APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

11 I.A.^{2d} 237

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in the sum of \$3500 entered on the verdict of a jury in an action by plaintiff to recover moneys advanced by him to Mars Motors, Inc., hereinafter called "Mars," at the request of the defendant.

The material facts are substantially uncontroverted, Mars operated a Packard automobile agency in the City of Chicago. During the latter part of 1953 it was in financial difficulties. Prior to November 29, 1953 plaintiff from time to time advanced to Mars varying sums aggregating \$3500 to pay its current payroll, rent and other bills. November 29, 1953 plaintiff received a letter voluntarily written and signed by defendant on the stationery of Mars, which reads:

"Chicago, Illinois
November 29, 1953.

"To Whom It May Concern:-

This is to advise that Paul Pletke has advanced to Mars Motors, Inc. the sum of Thirty-Five Hundred (\$3,500.00) Dollars which is to be applied to the purchase of corporate stock if and when a re-organization is effected.

If a re-organization is not effected and Mars Motors, Inc. discontinues business I have promised to repay the aforesaid sum of money to Paul Pletke. In the event of my demise before Paul Pletke is repaid, this obligation shall be binding on my executors or administrators.[sic]

Frank D. Shobe."

1894

January 1st

Dear Sir

I

have the honor

to acknowledge

the receipt of your letter of the 10th inst.

in relation to

the matter of the 1st of January

and in reply to inform you

that the same has been

forwarded to

the proper authorities

for their consideration

and I am, Sir, very

truly and respectfully

Yours, Sir, very

obediently, J. H. [Signature]

Very truly yours,

J. H. [Signature]

Very truly yours,

1894

Very truly yours,

J. H. [Signature]

Very truly yours,

J. H. [Signature]

Very truly yours,

J. H. [Signature]

Very truly yours,

J. H. [Signature]

Very truly yours,

December 21, 1953 plaintiff advanced the additional sum of \$6500 to Mars at the request of defendant. In order to obtain a franchise from the Packard Motor Company for the year 1954, Packard required Mars to raise \$30,000. Mars complied with the request of Packard. Included in the sum raised for Packard by Mars were the advances to it made by plaintiff. In January 1955 Mars was adjudicated bankrupt in the United States District Court.

Plaintiff alleges in his statement of claim that defendant represented to him that Mars was about to be reorganized; that defendant would personally repay the moneys advanced by plaintiff; and that the assets of Mars were sufficient to repay plaintiff's loan.

In his verified defense defendant admits that plaintiff advanced the sums of \$3,500 and \$6,500, respectively as alleged in the statement of claim, but denies that the loans were made at the special instance and request of defendant. Defendant also avers that after plaintiff advanced the moneys here in controversy he elected to accept a note from Mars for \$10,000 as security for the loan and that, as a consequence, the obligation of defendant was waived.

Defendant asserts that plaintiff's claim is barred by the statute of frauds, but this assertion is without merit for the reason that the writing sued upon meets the requirement of the statute.

The language of defendant's voluntary promise to repay plaintiff is plain and unequivocal. Defendant admits that there was no reorganization of Mars and that Mars did

Department of the Interior

Washington, D. C.

June 10, 1904

Mr. J. M. Smith, Secretary of the Interior

Dear Sir:

I have the honor to acknowledge the receipt of your letter of the 6th inst.

and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

Very respectfully,

Wm. H. Hunt

Chief of the Bureau of Land Management

Enclosed for you are two copies of a report of the

Commissioner of the General Land Office, dated June 1st, 1904.

Very truly yours,

Wm. H. Hunt

Chief of the Bureau of Land Management

Enclosed for you are two copies of a report of the

Commissioner of the General Land Office, dated June 1st, 1904.

Very truly yours,

Wm. H. Hunt

Chief of the Bureau of Land Management

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Very truly yours,

Wm. H. Hunt

Chief of the Bureau of Land Management

Enclosed for you are two copies of a report of the

Commissioner of the General Land Office, dated June 1st, 1904.

discontinue business when it was adjudicated bankrupt. These were the conditions defendant, who is a member of the bar, imposed upon himself and under which he guaranteed repayment to plaintiff of the advances made to Mars. But defendant insists that it was the intention of the parties that he was to be relieved of his promise to repay plaintiff if the \$30,000 was raised and a franchise secured from Packard. In our view there is no room for construction of defendant's written agreement. Moreover, plaintiff testified that he had a number of talks with defendant about repayment; that defendant offered plaintiff stock, and that plaintiff told defendant "I am not interested in stock." Plaintiff further testified that he never agreed at any time to "accept Mars Motors as my debtor." We think the jury could reasonably infer from the evidence that defendant's voluntary written agreement to repay plaintiff for the advances made to Mars was for the purpose of inducing plaintiff to advance the additional sum of \$6,500. In our view the evidence is ample to support the verdict and judgment.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND FEINBERG, JJ. CONCUR.

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PHYLLIS J. ALAIMO, as Administratrix
of the Estate of Robert C. Alaimo,
Deceased, and JUDGE & DOLPH, LTD., a
corporation, for the use of HARTFORD
ACCIDENT & INDEMNITY COMPANY, a
corporation,

Appellees,

v.

HENRY F. DU PONT,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

111 A. 2d 238

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administratrix, brought this action to recover for the wrongful death of Robert C. Alaimo, deceased, and plaintiff Judge & Dolph joined in the action to recover under the Workmen's Compensation Act, for the use of Hartford Accident & Indemnity Company, the insurance carrier, the amount paid out by them in accordance with an award of the Industrial Commission. Upon a previous appeal (4 Ill. App. 2d 85) we reversed and remanded the cause for a new trial, because the trial court directed a verdict for defendant when the cause should have been submitted to a jury. Upon a second trial the evidence for plaintiff was substantially the same. Defendant offered no evidence upon the second trial.

In the interest of brevity, we refer to the statement of facts and our holdings in our reported opinion on the former appeal. The conclusions there reached are controlling upon the present appeal. Trego v. Rubovits, 228 Ill. App. 559. We find no reason for departing from our previous holdings.

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The additional points urged upon this appeal for reversal are: (1) the claimed prejudicial conduct of counsel in his closing argument to the jury; (2) that the court erred in giving certain instructions for plaintiff; and (3) that plaintiff Judge & Dolph cannot recover under the Compensation Act for money paid out in accordance with the award, because of their negligence, which contributed to cause the death of decedent (citing Grasse v. Dealer's Transport Co., 412 Ill. 179).

We think, upon this record, that the remark of plaintiff's counsel in his final argument to the jury, while concededly improper, was not so prejudicial as to require a reversal of the judgment. The court promptly sustained an objection to the remark, and there was no motion made to withdraw a juror and declare a mistrial. Walsh v. Chicago Rys. Co., 303 Ill. 339; Reinmueller v. Chicago Motor Coach Co., 341 Ill. App. 178; Roesler v. Liberty National Bank, 2 Ill. App. 2d 54.

Defendant complains of instructions Nos. 1, 2 and 5, given for plaintiff. We think each of these instructions correctly stated the law applicable to the instant case and were in accordance with the principles of law announced in our former opinion. The refused instructions tendered by defendant, though assigned as error in the motion for new trial, are not made a point for reversal upon this appeal, nor are they argued in defendant's brief.

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On the former appeal we determined that defendant had a duty to keep the elevator in question in a reasonably safe condition. It appears from the present record that neither defendant nor his agent, over a period of approximately 20 years, made any inspection of the elevator or its needed repair. The jury could well have concluded that the failure to inspect and make the needed repairs, when the lease specifically gave defendant the right to enter the premises and inspect the elevator and make necessary repairs, constituted negligence.

The complaint alleged, as to plaintiff Judge & Dolph, that it and its employees were free from contributory negligence that proximately contributed to cause the said injuries and death of decedent. The answer specifically denied this allegation. It thereupon became one of the issues for the jury to determine. It is necessary under par. 138.5 (b) of Ch. 48, Ill. Rev. Stat. 1955, in order for the employer to recover from a third party tort feason what he is obliged to pay the employee under the Compensation Act, that the employer be free from negligence which contributed to cause the injury or death. Geneva Construction Co. v. Martin Transfer Co., 4 Ill. 2d 273, 276.

On behalf of Judge & Dolph, instructions Nos. 6 and 7 were tendered and given by the court. Instruction No. 6 is:

"You are instructed that contributory negligence on the part of plaintiff Judge & Dolph, Ltd., or its employees is not a defense to the claim of plaintiff Judge & Dolph, Ltd., for the use of Hartford Accident &

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the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 200 million to 400 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

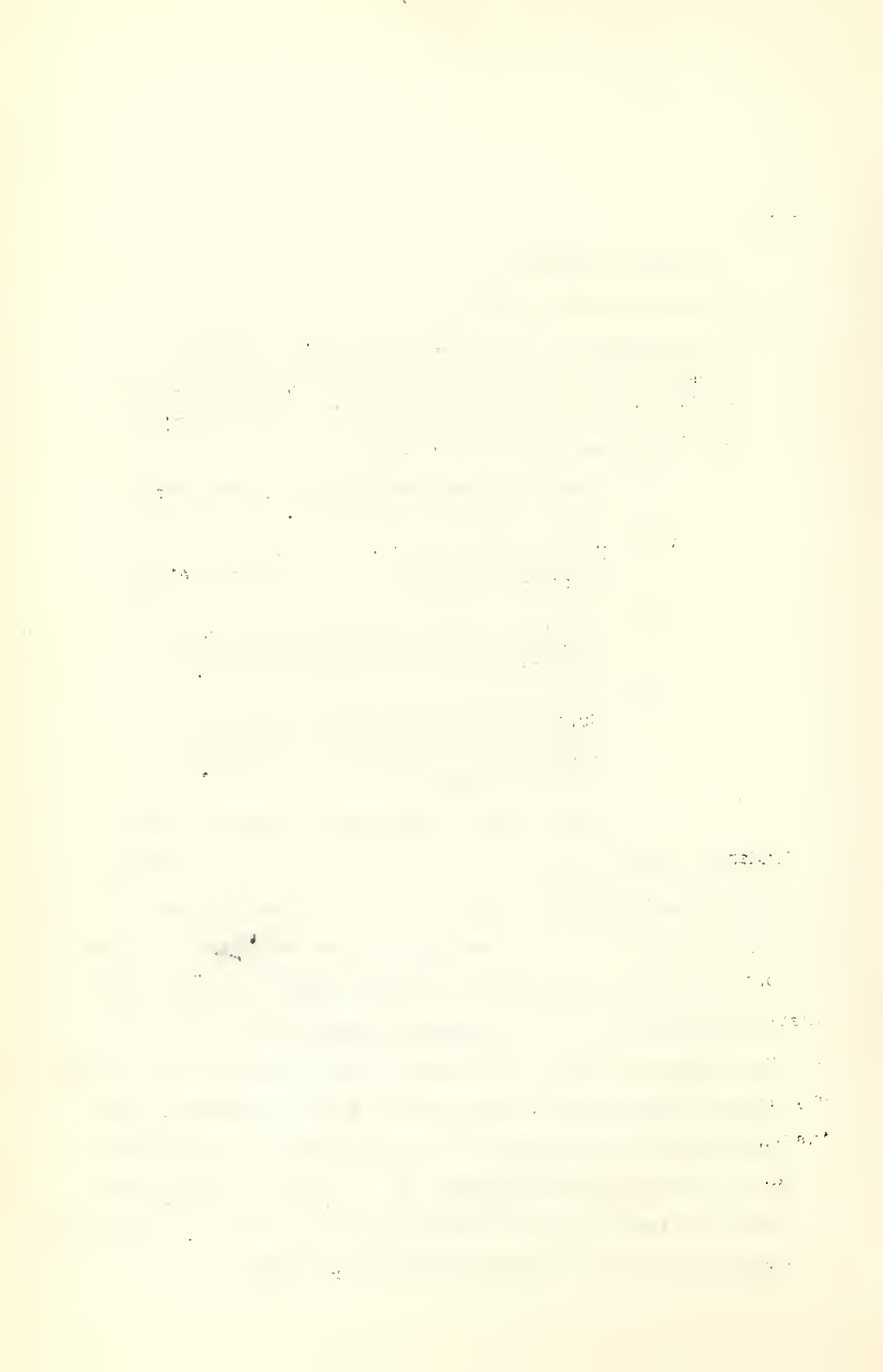
Indemnity Company."

Instruction No. 7 is:

"In reference to the claim of plaintiff Judge & Dolph, Ltd., for the use of Hartford Accident & Indemnity Company, you should find defendant guilty if you find from a preponderance of the evidence, under the instructions of the Court, that the said plaintiff has proved the following facts:

- "(1) That defendant was guilty of negligence as alleged in the complaint.
- "(2) That such negligence, if any, was a proximate cause of the injury and death of Robert Alaimo.
- "(3) That the widow and next of kin of Robert Alaimo suffered pecuniary injury in consequence of the decedent's death.
- "(4) That an award was entered by the Industrial Commission of Illinois requiring said plaintiff to pay compensation on account of the death of said decedent."

At the time these instructions were tendered, defendant made specific objections to the giving of them, and they are assigned here as error. Instruction No. 6 does not state the law correctly, and it withdrew the issue of contributory negligence of Judge & Dolph from the jury. Instruction No. 7 was a peremptory instruction, which did not require the jury to find that Judge & Dolph was free from any negligence which contributed to cause the death. Both instructions are contrary to the requirement of the statute cited, and Geneva Construction Co. v. Martin, supra, which refers to the employer, under the statute, as the non-negligent employer, and they constitute reversible error.



For the reasons given, the judgment as to plaintiff Alaimo is affirmed, (Chmielewski v. Marich, 350 Ill. App. 379, affirmed 2 Ill. 2d 568) and the judgment as to Judge & Dolph is reversed and the cause remanded for a new trial as to the latter plaintiff.

AFFIRMED IN PART AND REVERSED
IN PART AND REMANDED FOR A
NEW TRIAL.

LEWE, P.J. AND KILEY, J., CONCUR.

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HAZEL DENNIS,

Appellant,

v.

OTTO NAEGELE and FRIDA NAEGELE,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

111 A. 239^{2d}

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This suit is to rescind a real estate contract and to recover the payments and the value of the improvements made. The chancellor dismissed the suit for want of equity and plaintiff has appealed.

The contract was made March 17, 1949, and bound plaintiff to pay \$13,000 for a deed to the property. She was to pay \$500 down and \$200 per month on the purchase price. The monthly payments were to be reduced to \$150 when a mortgage on the property was paid off. The contract provided that upon plaintiff's "payment of two-thirds of the purchase price . . . , seller agrees to convey . . . by a good and sufficient warranty deed . . . , and the purchaser agrees to give back to seller a mortgage for the balance" Plaintiff completed the two-thirds payment in June 1954. Defendants did not convey the property and plaintiff sued.

Plaintiff contends that the evidence shows a breach of contract by defendants and that the record shows as a matter of law that defendants could not perform by conveying a "good and sufficient warranty deed."

April 5, 1954, plaintiff's attorney wrote defendants that plaintiff having complied with the contract and defendants having failed to convey, that if the conveyance was not made immediately, legal action would be taken. June 4 the attorney wrote again requesting the preparation of mortgage papers so plaintiff could execute them and get a deed from defendants. June 16 another letter was written telling defendants that if the contract was not performed plaintiff would sue. June 21 a final letter notified defendants of plaintiff's election to rescind.

Defendant Mrs. Naegele testified that her agent had the mortgage papers ready on and from May 12 and that defendants were ready during that time to deliver a deed, but that plaintiff would not go to the agent's office. She said the first letter made her ill and on May 12 she called plaintiff and "begged" for the mortgage and asked plaintiff several times during May and early June to see her agent and to execute the mortgage. She did not recall receiving the June 4 or June 16 letters since she and her husband were "too sick." She did remember receiving the June 21 letter. The letter of June 4 appears to have been "refused." Plaintiff testified also that the agent called her in May and asked her to come to his office to sign the mortgage papers. Plaintiff wrote Mrs. Naegele friendly letters in May, one indicating it was written in response to inquiry about the mortgage.

The evidence showed that the \$2,500 note referred to in the contract was paid in 1951, but the trust deed was

not released of record until after the instant trial was begun. The unreleased trust deed was relied on by plaintiff as proving inability of defendants to perform. Defendants' evidence, referred to, was sufficient to offset plaintiff's testimony. Under the circumstances there was no "reasonable probability of litigation" so as to render defendants' title unmerchantable under the rule of Winters and Chicago Title and Trust Co. v. Polin, 309 Ill. App. 458, 462, that equity will not compel one to "buy a law suit."

The record discloses that the chancellor intended to adjust this controversy at the trial, but it is not clear that all the available means were employed to carry out the intention. It does not appear that the parties were definitively asked, or given an opportunity, to make tenders of performance, even though Frida Naegele was asked whether defendants were ready to make a conveyance and she answered "naturally." The record is silent as to an opportunity to plaintiff to tender the mortgage.

In plaintiff's letter of June 4 there is an implication that defendants needed or wanted cash instead of a purchase money mortgage. This letter stated that plaintiff could not get an "outside mortgage" and requested defendants to have the mortgage papers prepared, as "it is our intention to proceed." The contract did not impose this obligation upon defendants, but the testimony indicates that they considered it their obligation since they and their agent had asked plaintiff to go to the agent's office for the purpose

The first part of the book is devoted to a general survey of the history of the subject. The author begins with a brief history of the subject, and then proceeds to a more detailed account of the various theories and methods which have been employed in the study of the subject. The second part of the book is devoted to a more detailed account of the various theories and methods which have been employed in the study of the subject. The third part of the book is devoted to a more detailed account of the various theories and methods which have been employed in the study of the subject.

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of executing the papers. Experience would show this procedure was the reasonable one since defendants would have to be satisfied with the mortgage terms. In view of these circumstances and in view of the consequences to plaintiff of the failure to tender performance of her obligation, it is our opinion that justice requires a reversal of the decree for the purpose of giving the chancellor another opportunity to induce the parties to make tenders of performance. Should plaintiff make a lawful tender of performance according to the contract terms and defendants reject the tender, the court should enter a decree of rescission upon an accounting by plaintiff for rents collected with allowance for proper credits. Should plaintiff refuse to make a lawful tender the decree should be entered dismissing plaintiff's suit for want of equity. The chancellor in giving this opportunity to perform according to contract terms should allow the parties only such time as he deems reasonable. In equity the rights of the parties are determined by the circumstances at the time of entry of the decree and, accordingly, the opportunities to be given on remandment are not too late. See Moehling v. Pierce, 3 Ill. 2d 418, 424.

For the reasons given the decree is reversed and the cause remanded for the purpose of giving the parties an opportunity to tender performance, as noted in the opinion.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FEINBERG, J. CONCURS.

LEWE, P.J., TOOK NO PART.

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46898

JUNE VIVIAN McDONALD,
Appellee,

v.

CLYDE D. McDONALD,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

11 I.A.^{2d} 240

~~RE.~~ PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff and defendant were married on September 22, 1946 at Waukegan, Illinois, and three children were born of the marriage. The family lived in Chicago, Illinois until September 1952, at which time they moved to Corpus Christi, Nueces County, Texas, where, in February 1954, plaintiff obtained a decree for divorce which awarded her custody of the children and ten dollars a week for support of each child. Thereafter, defendant moved back to Chicago, Illinois, remarried and established his home here. In January 1955 plaintiff moved back to Chicago with the children. In April of that year she initiated the instant proceeding by filing a petition in the Superior Court of Cook County to register the Texas decree, alleging, among other things, that defendant was in arrears on the support payments. Shortly thereafter orders were entered reducing the support payments to twenty dollars a week (one of the children had in the interim been given out in adoption), reducing the arrearages from \$450.00 to \$300.00, and granting defendant the right of visitation every Saturday from twelve

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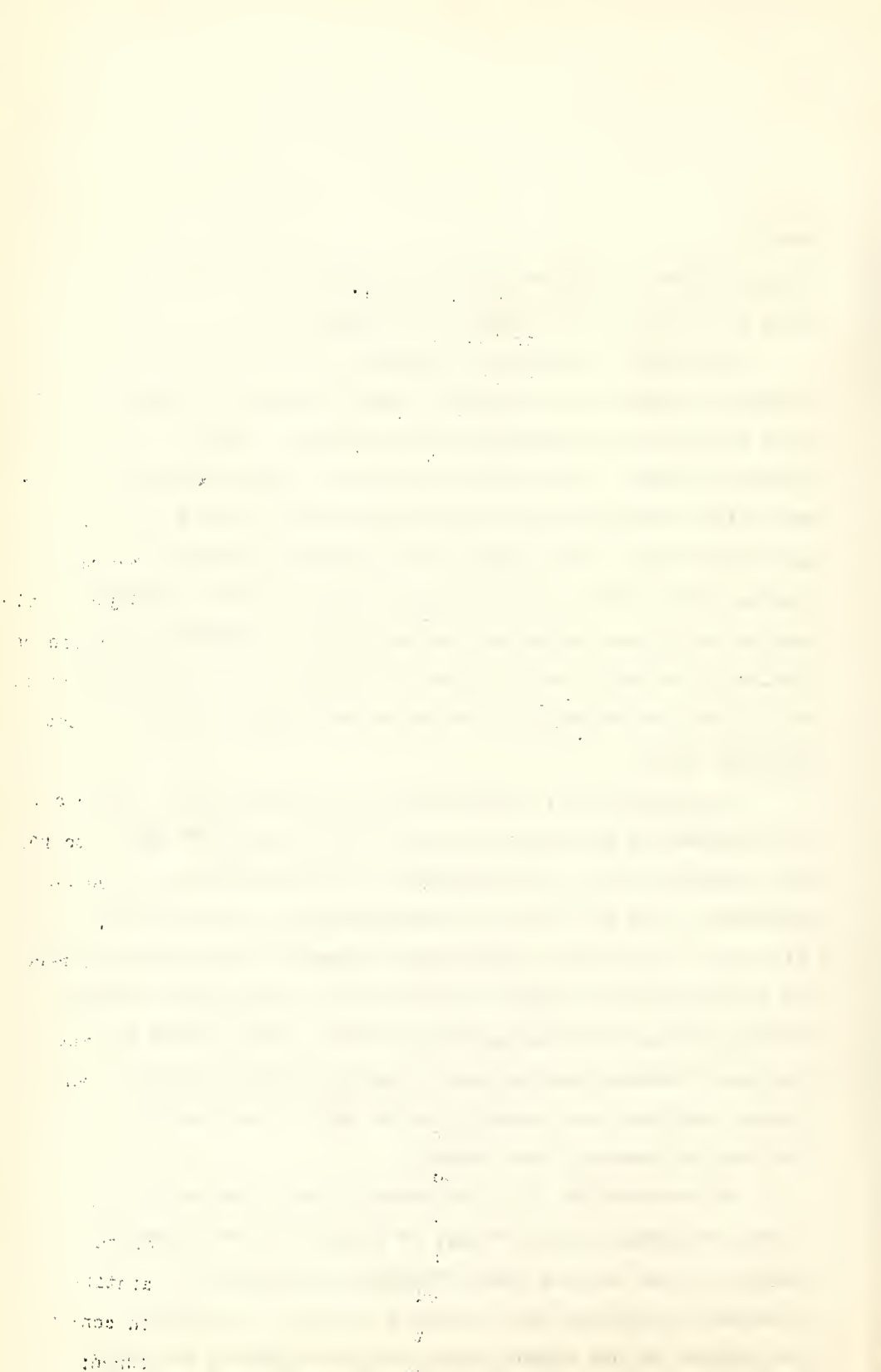
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noon to eight o'clock at night; the Texas decree had been silent as to the rights of visitation.

In June of that year, following the entry of the foregoing orders in the Superior Court, defendant learned that plaintiff had taken the children back to Corpus Christi, Texas. He continued to make the support payments until the latter part of August 1955, when he filed a petition alleging the removal of the children from the jurisdiction without his knowledge, seeking an order terminating the support payments, and asking for a direction on plaintiff to return the children to Illinois so that he could visit them, in accordance with the order entered in the Superior Court.

On September 30, 1955 plaintiff petitioned for a rule on defendant to show cause and for an order on him to pay her attorneys' fees. On November 8, 1955 she filed an amendment, nunc pro tunc as of September 30, 1955, by leave of court, wherein she alleged that, inasmuch as she received no alimony and was unable to find suitable employment in Cook County, she had returned to Nueces County, Texas, where it was more probable that she could find employment; and she prayed that the court approve her action in removing the children to Nueces County, Texas.

On November 28, 1955 the Superior Court adopted the decree of Nueces County, Texas, as a decree of the Superior Court; it also ordered that defendant pay plaintiff's attorneys' fees, and that defendant be held in contempt for failure to pay support money for the children; further,



it approved plaintiff's action in removing the children to Texas. Defendant appeals from these orders.

Defendant takes the position that the court erred in approving the removal of the children to Texas and in denying his petition to suspend the support payments while they were there. The question presented is not one of custody but, rather, one of visitation. His paramount grievance would seem to be, not so much plaintiff's removal of the children to Texas, thus making visitation difficult, but the denial of his request to suspend the support payments while the children are out of the state. Cases cited and relied upon by defendant involve the custody of children; in the instant proceeding that issue was determined by the Texas decree. In some of the earlier decisions, the courts were reluctant to allow the children to be removed from this jurisdiction to another state (Miner v. Miner (1849), 11 Ill. 43; Hewitt v. Long (1875), 76 Ill. 399 (which contains a well-reasoned and lengthy dissenting opinion filed by two of the judges); Chase v. Chase (1896), 70 Ill. App. 572). However, it would seem to us that a realistic appraisal of the situation requires that accessibility and distance be measured in terms of time as well as of miles—a point of view adopted in the recent case of Schmidt v. Schmidt (1952), 346 Ill. App. 436; there the court pertinently notes that in the hundred odd years since the Miner decision was written "methods of transportation have changed," and states further that in the light ~~XX~~ "of modern living conditions to say that as a fixed rule of law, without exception, the

child may never be taken from the State out of the jurisdiction of the court seems harsh and absurd." The Schmidt case, which considers the earlier Illinois decisions as well as those of other jurisdictions, held that a decree permitting a ten-year-old boy's mother, who had been given his custody in divorce proceedings, to establish a home for him in New York was not unreasonable or arbitrary, where the father had limited custody and visitation periods. It is elementary that in determining who shall have custody of children, their welfare is always paramount; the question of visitation is a subsidiary problem. In the instant proceeding the reasons for removing the children to Texas were presented to the court and found sufficient. Under the circumstances of this case we think it was proper to allow plaintiff to remove the children to another jurisdiction, and certainly such removal would not justify defendant in refusing to support them.

Defendant left Texas of his own accord, came to Chicago, remarried and did not see the children for over two years. During a part of that time he discontinued payment for their support. Plaintiff has now returned to ^{and} Texas, ^{and} resides in Nueces County where the original proceedings were had and the original decree and orders were entered. The position of defendant today is exactly the same as it was prior to the time plaintiff came to Chicago. Under the Texas decree he was at all times bound to pay support money for the children, and the Illinois decree,

which was entered on the joint motion of both parties, merely affirms and registers the Texas decree and requires defendant to pay the same amount of money for the same purpose. Had plaintiff not come to Chicago in the first instance, defendant's obligation to support his children would have been exactly the same, even though he does not see them; and it is worth noting again that the Texas decree did not provide for rights of visitation on his part. As stated, the Superior Court of Cook County approved the removal of the children to Nueces County, Texas, under the allegations of plaintiff's amended petition. The court's order was prompted by the consideration that the interests of the children who are in the mother's custody would be best served by permitting them to return with her to Texas. Defendant made no effort to visit them there before the entry of the decree in Illinois, and should not now be allowed to discontinue his support of them on the obvious pretext that he has lost his prior right of visitation.

For the reasons indicated we are of the opinion that the Superior Court did not err in its order of November 28, 1955, and it is therefore affirmed.

ORDER AFFIRMED.

NIEMEYER and BURKE, JJ., CONCUR.

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46786

HENRY SLABOSZEWSKI and ANTHONY
PATULA, surviving partners of
Harold F. Egan, Deceased, and
Henry Slaboszewski and Anthony
Patula, d/b/a Builders Supply &
Trucking Company,

Plaintiffs-Appellees,

v.

EDMUND J. JOHNSON and ELEANOR B.
JOHNSON, also known as Eleanor
Borgmeier, his wife, and KATHERINE
E. NOVA,

Defendants-Appellants,

ELEANOR B. JOHNSON,

Counterplaintiff-Appellant,

v.

HENRY SLABOSZEWSKI and ANTHONY
PATULA, surviving partners of
Harold F. Egan, Deceased, and Henry
Slaboszewski and Anthony Patula,
d/b/a Builders Supply & Trucking
Company,

Counterdefendants-Appellees.

On Appeal of ELEANOR B. JOHNSON
also known as Eleanor Borgmeier,
Defendant-Counterplaintiff-Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

11 I.A. ^{2d} 241

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

In an action at law Henry Slaboszewski and Anthony
Patula alleged that they are the surviving partners of
Harold F. Egan, deceased, who died on June 29, 1951; that
the three partners were engaged in the construction business
under the trade name of Builders Supply & Trucking Company;
and that Edmund J. Johnson, Eleanor B. Johnson and Katherine
E. Nova are justly indebted to them in the amount of \$4,624.34,
with interest thereon from June 1, 1948 for work, labor,

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 3. City: _____
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services and materials furnished from October, 1947 to April, 1948, in remodeling a building in Lemont, plus a 15% contractor's fee, also for moving office equipment. Eleanor B. Johnson filed an amended answer presenting issues of fact. She also filed a counterclaim on a note for \$2,500, dated April 16, 1948, due six months after date with interest at 6% per annum, signed "Builders Supply and Trucking Company, Harold F. Egan, Partner, Henry Slaboszewski, Partner," payable to Michael J. Tadyshak, and by him assigned to her on March 14, 1952. Plaintiffs' defense to the counterclaim is that Mrs. Johnson is not a bona fide owner or holder of the note. Edmund J. Johnson and Katherine Nova were dismissed during the trial. The jury returned two verdicts, one finding the issues for the plaintiffs on their claim and assessing damages at \$4,333.29, with interest at 5% from April 18, 1948, and the other finding the issues against the defendant (cross-counterplaintiff) on her counterclaim. The judgment, originally entered for \$4,333.29, with interest, was amended to include calculated interest of \$1,504.97, and entered for \$5,838.26. To meet defendant's objection of a discrepancy between the allegations in the complaint and the verdict as to the date when the computation of interest begins, the plaintiffs entered a remittitur of \$25.28. Defendant's motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial were denied. Defendant appealing, asks that the judgment be reversed, and that judgment be entered for her on the note, or that the cause be remanded for a new trial.

The first point made by the defendant is that plaintiffs are not the surviving partners of Harold F. Egan, deceased, within the meaning of the Partnership Act; that for more than two years prior to his death Egan was the sole proprietor of the business operated under the trade name; that he was the proper party to bring the suit if a right of action existed; and that after his death any such action should be brought by his personal representative. From a study of the transcript of the testimony and exhibits we are satisfied that there was competent evidence to support a finding that plaintiffs and Egan were partners. The issue as to the partnership was one of fact to be decided by the jury. The plaintiffs as the surviving partners were the proper persons to institute the suit. See subparagraph (d) of Par. (2) of Section 25 and Section 37 of the Uniform Partnership Act.

Defendant maintains that the court erred in allowing plaintiffs' interest for unreasonable and vexatious delay. She says that the complaint is insufficient to support such a claim and that there is no proof to show any unreasonable and vexatious delay. The complaint asks interest from June 1, 1948 to the date of payment "at the legal rate of 5% per annum." Defendant did not move to strike the allegation as to interest or ask for a more specific statement as to that allegation. The argument to the jury and the instructions indicate that the parties and the jury understood that plaintiffs were asking for interest under the claim that there was an unreasonable and vexatious delay. Paragraph 3, Section 42

of the Civil Practice Act provides that all defects in pleadings either in form or substance, not objected to in the trial court, are waived. The defendant is not now in a position to insist that the allegations as to interest are insufficient to support the judgment for interest. We are of the opinion that the evidence supports the finding that there was an unreasonable and vexatious delay in payment of the account.

Defendant asserts that the court erred in denying her motion for a directed verdict on her cross-complaint on the promissory note. The evidence showed without contradiction that she is the holder of the note. In her counterclaim she alleges that she is the owner and holder of the note. In her brief she maintains that her motion for a directed verdict on the cross-complaint should have been granted on the ground that she is the "legal holder and/or owner of the note." It is well established that as the legal holder of the note she has the right to maintain the action. The note was endorsed by the payee. He also gave defendant a separate assignment of the note. Defendant testified that the note was assigned to her on March 13, 1952, by the payee for good and valuable consideration consisting of legal services rendered by her for the payee from 1943 to 1952. At the time of the assignment of the note to the defendant the payee was competent. The note was first placed with defendant for collection. She turned it over to a firm of attorneys and suit was filed thereon in the name of the payee

1. The first condition is that the system must be

in a state of equilibrium before the experiment is

performed. This is necessary to ensure that the

results are not affected by the initial conditions.

2. The second condition is that the system must be

isolated from the environment. This is necessary to

prevent any external influences from affecting the

results of the experiment.

3. The third condition is that the system must be

observed in a way that does not disturb the system.

4. The fourth condition is that the system must be

observed in a way that does not change the system.

5. The fifth condition is that the system must be

observed in a way that does not alter the system.

6. The sixth condition is that the system must be

observed in a way that does not affect the system.

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observed in a way that does not affect the system.

10. The tenth condition is that the system must be

observed in a way that does not change the system.

11. The eleventh condition is that the system must be

observed in a way that does not alter the system.

12. The twelfth condition is that the system must be

on April 6, 1951. The action on the note was pending until 1954, when it was dismissed for want of prosecution. In the meantime the payee of the note had become incompetent. Plaintiffs call attention to the fact that at the time of the assignment of the note defendant owed the payee in excess of \$7,000. Plaintiffs point out that the complaint in the instant suit was filed in May, 1952, that the defendant's first sworn answer and counterclaim did not mention the note and that her amended answer filed October 30, 1952 did not mention the note. Plaintiffs call attention to the fact that the cross-complaint on the note was filed seven days prior to the commencement of the trial. We are of the opinion that there was no factual issue to be determined by the jury on the counterclaim. There was no dispute that she is the holder of the note. The circumstances mentioned by plaintiffs do not overcome the case made by the defendant and do not present any factual issue. Plaintiffs concede that they owed the note either to the conservator of the payee or to the defendant. The conservator did not become a party to the action and is not barred by the judgment from asserting any rights it may have. We find that the court erred in refusing to direct a verdict for the defendant for the amount of the note plus interest.

Defendant urges that the verdict finding the issues on the complaint against her are against the manifest weight of the evidence, and the result of confusion, sympathy, passion or arrived at by chance or a misconception of the evidence. A careful reading of the transcript and the

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Journal of Management Studies, 1986, 23(1), 7-10.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

exhibits leads us to the conclusion that the verdict is not contrary to the manifest weight of the evidence. We cannot say that the verdict was the result of confusion, sympathy or passion, or that it was arrived at by chance or a misconception of the evidence. The court did not err in admitting evidence or in refusing to admit evidence. In our opinion there was no error in giving the instructions tendered by the plaintiffs as to an unreasonable or vexatious delay in payment.

Defendant states that the court erred in refusing to instruct the jury that if Anthony Patula was not in fact a partner "You are to deliberate no further but must find all of the issues for the defendant." The instruction is defective in that it fails to set out the time in which Patula must have been a partner. The other three instructions tendered by the defendant which the court refused to give were not pertinent to the issues. Defendant complains that certain remarks and conduct of plaintiffs' attorney and certain remarks and conduct of their witnesses tended to inflame and prejudice the jury against the defendant. We do not find that there was any improper conduct by the attorney for the plaintiffs or the witnesses. The day after the proofs were closed plaintiffs' attorney caused Tadyshak, the payee of the note, to be brought into court on a stretcher. He had been adjudicated incompetent about May 1, 1953. The court would not permit him to testify. Counsel for the defendant stated that he had no objection to Tadyshak remaining in the courtroom and that he was not moving to

exclude him. Having consented to the presence of Tadyshak, the defendant cannot consistently argue that the court erred in allowing him to remain.

The judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to enter judgment in accordance with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, P. J., and NIEMEYER, J., CONCUR.

616 A

46832

JOSEPH RICCORDINO,

Appellant,

v.

MARY RICCORDINO,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

11 I.A.^{2d} 242

JUDGE BURKE DELIVERED THE OPINION OF THE COURT.

Joseph Riccordino and Mary Carbone were married at Chicago on June 30, 1946. They separated on January 2, 1953. On January 14, 1953, the husband filed a complaint for divorce and for the sole care, custody and education of the children. On March 11, 1953, the court entered a decree dissolving the bonds of matrimony between the parties on the ground that the defendant had been guilty of extreme and repeated cruelty without provocation. The decree awarded the care, custody and control of the children, Dominic, then five and one-half years old and Mary, then three and one-half years old, to the plaintiff until the further order of the court. The decree provided that the defendant "shall be at liberty" to apply for a modification of the order for the custody of the children "at any time hereafter" and reserved "said question of custody" for the further consideration of the court. The mother was granted "full right" to visit and have the children "at all reasonable times and places." The decree incorporated the agreement of the parties that plaintiff would pay defendant's attorney's fees, that she relinquish all rights and claims

in certain real estate formerly held in joint tenancy by the parties, all rights to certain household furniture and all right to any claim for alimony.

On November 15, 1954, the defendant filed a petition stating that at the time of the entry of the decree the custody of the children was awarded to plaintiff because of her inability to provide a proper and suitable place for their upbringing; that on May 14, 1953, she married Michael Riccordino; that she lives with him in respectable surroundings; that he earns a substantial income; that her husband is arranging to bring to the United States his fourteen year old son living in Italy; that her husband and defendant desire the custody of Dominic and Mary for whom she has great love and affection; and that it is for the best interests of the children that she be awarded their care, custody and education. In an answer the plaintiff denied that his former wife is a fit and proper person to have the care and custody of their children and stated that defendant is married to plaintiff's brother; that she was "conducting an affair" with Michael before the divorce was granted to plaintiff; that shortly after the divorce decree was entered she married Michael; that plaintiff is and has always been a proper person to have the care and custody of the children; that there has been no change in the circumstances sufficient to warrant the transfer of the custody of the children to the defendant; and that it would be detrimental to the welfare of the children to

remove them from his custody. Following a hearing the chancellor entered an order modifying the decree by awarding the care and custody of the children to the defendant for a period of six months commencing with the date of the order and to the plaintiff for the succeeding six months, and that thereafter the custody of the children shall be in the defendant and plaintiff alternately for six months at a time until the further order of the court, with right of visitation. The order concluded by providing that the hearing on any motion for support for the children while in her custody be continued generally. Plaintiff appeals.

Although the defendant was represented by counsel she did not contest the application for divorce. The defendant left home on January 2, 1953. The divorce was entered on March 11, 1953. When the mother left, plaintiff placed the children in the home of his sister, Rose Koetzle, where they remained for eight months. Plaintiff visited the children every night while they were at his sister's home. He remarried on July 25, 1953, and from that time on the children have been living with plaintiff and his second wife. At the time of the divorce hearing the defendant was living with her brother. She also lived with a private family and for a few days at the Greenview Hotel, near 63rd and Halsted Streets, Chicago. On May 14, 1953,^{at} Nueva Laredo, New Mexico, defendant married Michael, a brother of plaintiff. Michael had a child by a former marriage. A witness testified that Michael told him that

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

previous to his marriage to defendant he had obtained a "Mexican divorce" from his wife who resided in Italy. Plaintiff had brought his brother Michael from Italy and had boarded him without charge in his, plaintiff's, home. Michael went to Mexico to reside in order to be in a better position to enter the United States as a permanent resident. Plaintiff sent Michael \$7,000 while the latter was in Mexico. The defendant testified that it took her a year to get Michael into the country.

The defendant came back to the United States a week after her marriage to Michael. Defendant lived in Pittsburgh until July 4, 1953, when she returned to Chicago. For a period of approximately eleven months the defendant did not see the children. During part of this time she was ill. While she was in Pittsburgh she did not attempt to communicate with her children by telephone or by mail or send them birthday cards. On the issue of the fitness of the defendant to have the custody of her children, evidence was introduced for the purpose of establishing that in the month of March, 1953, after her divorce she had sexual intercourse with plaintiff's brother-in-law, Dan Koetzle. At the time Koetzle was separated from his wife. Mrs. Koetzle obtained a divorce decree in July, 1953. The Koetzles were remarried in December, 1953. The defendant denied ever having sexual relations with Koetzle. She testified that she had been out with him three times and admitted having kissed him once. Koetzle testified that he had intercourse with the defendant in a motel in Indiana and also at the Greenview Hotel in

1. The first of these is the fact that the majority of the population of the country is of Italian descent. This is due to the fact that the country was colonized by Italy in the late 19th century. The Italian population has since become the dominant group in the country.

Chicago. On the hearing the defendant volunteered to take a lie detector test regarding her relations with Koetzle if he would submit to a test. Thereupon the parties stipulated to the test. Afterward an agreed series of questions was put to them. The examiner concluded that she had not told the truth when she denied having had sexual intercourse with Koetzle. He found that Koetzle had told the truth when he admitted having sexual intercourse with the defendant. Under the stipulation the report on the test was received in evidence. The evidence shows that the children are well and happy in their present environment. The boy goes to school. The home maintained by plaintiff and his present wife is clean and comfortable and the children are well adjusted to their environment.

The primary consideration in determining the award of the custody of a minor child is his welfare and best interests although the rights of the parents and other persons should be considered. It follows that each case must be determined on its own facts. The defendant, citing Nye v. Nye, 411 Ill. 408, argues that it is usual to award children of tender years to the mother. This was not done in the case at bar. In January, 1953, she did not evince the instinct of a mother when she walked away from home leaving her young children. They needed her loving care. She was so anxious to marry her brother-in-law that she did not contest the divorce suit or the award of the custody of the children to their father. Before proceeding

to Mexico to marry Michael she had illicit intercourse with Dan Koetzle, her husband's brother-in-law. She did not see her children for several months. The cases of Harms v. Harms, 323 Ill. App. 154, and Nye v. Nye, cited by the defendant, are not applicable to the factual situation in the case at bar.

The defendant agrees with the plaintiff that "a division of custody permitting the children to remain with one parent for six months and with the other parent for the next six months of each year is not a good thing" and suggests that the interests of the children would be better served by an award to her of their complete custody. The conduct of the defendant does not support the order for a change of custody of the children to her. We are convinced that the welfare of the children requires that their custody be not disturbed. For this reason the order of the Circuit Court of Cook County is reversed.

ORDER REVERSED.

FRIEND, P. J., and NIEMEYER, J., CONCUR.

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BETH RISH,

Plaintiff,

v.

GEORGE RISH,

Defendant - Appellee,

BERNARD SEVIN,

Intervening Petitioner,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

11 I.A.^{2d} 243

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Bernard Sevin, hereinafter called the intervenor, a maternal uncle of Sheila Rish, a minor under 7 years of age, appeals from an order modifying the decree in a divorce suit between the parents of the minor by awarding full care, custody and control of the minor to her father, hereinafter called defendant, and from an order denying the intervenor's motion for the right to visit with the minor.

The decree of divorce, entered December 21, 1951, found that defendant was guilty of desertion and that the parties had agreed that the custody of their infant child (the minor herein) be awarded to plaintiff, the mother, and that defendant pay \$15 per week for the child's support. Custody of the child was awarded to the mother, and defendant was given the right to visit and be visited by the child once every two weeks until the infant reached the age of 3 years, and once a week thereafter. Until the mother died, in July 1955, defendant visited the child regularly and promptly paid the support money.

In September, 1955 intervenor filed his petition in the divorce suit, alleging the death of his sister; that his sister and the minor had resided with him and his mother since November 29, 1949 when defendant deserted the mother of the minor; that intervenor and his mother were appointed guardians of the person and estate of the minor by the last will and testament of her mother. Intervenor asks that he and his mother, Esther Sevin, be substituted as custodians of the minor in lieu of her deceased mother, and that defendant be granted the rights of visitation set forth in the original divorce decree. Defendant answered, denying that it was for the best interests of the minor that she remain in the home of her aged grandmother and 40-year-old bachelor uncle, and praying that the petition be dismissed and the divorce decree be modified, granting custody of the child to defendant. Defendant also filed a petition asserting his right to the full custody of the minor as her natural father, he having a suitable home in which to raise the child where she will have the companionship of other children of her age. Intervenor answered, setting up matters occurring prior to the birth of the minor and the separation of her parents, and also setting out certain recitals in the purported last will and testament of the deceased mother of the minor.

The evidence on the hearing shows that defendant is a self-employed certified public accountant, with an average income of from \$6000 to \$6500 a year, net. He had been married and divorced before his marriage with the mother of

the minor. After the divorce he married again, but was not living with his wife at the time of the hearing. Since September, 1955 he had been living with his sister and her husband in the 6-1/2 room home owned by them. In this home there is a bedroom which his daughter can occupy alone; that defendant intends to take her to this home if awarded custody of her; his sister and her husband, who have a 4-year-old adopted son, are willing to receive her. Business associates of defendant testified to his temperate habits and good reputation.

The burden of proving unfitness of defendant is on intervenor, and unless the unfitness of the father is established by clear evidence, his fitness will be presumed and the custody of the child awarded to him. Kulan v. Anderson, 300 Ill. App. 267. Intervenor attempted to establish defendant's unfitness to have the custody and control of his daughter and to show that defendant has forfeited his right to the custody of his child by his conduct by attempting to prove his relations with his deceased wife prior to the birth of the child and to the divorce. Most if not all of the proffered testimony was hearsay, and all was irrelevant and immaterial to the issue of defendant's fitness for the care and custody of his daughter. The purported last will and testament (intervenor neither alleged nor proved that it had been probated) contained lengthy recitals of alleged misconduct of defendant and the reasons of testatrix for denying to him the control and custody of their daughter. Intervenor

insists that these recitals be accepted as true because they were not denied in any pleading by defendant nor disproved on the hearing. This contention is untenable. The recitals are self-serving statements of the testatrix and not competent as evidence.

Intervenor also offered the testimony of Dr. Harry R. Hoffman, a physician who examined the minor in the presence of her uncle for the purpose of testifying as an expert. This examination revealed a normal child of her age. The doctor was asked if he had an opinion as to what the effect would be of her removal from the home of her uncle and grandmother; did he have an opinion of what effect her removal would have on her, emotionally, and so far as her health was concerned; and finally, assuming that there was no emotional problem with the child at the present time, would it be for the best interests of the child that she be removed from the custody of her uncle and grandmother and placed in the custody of her natural father. The court sustained objections to these questions. These rulings were proper for several reasons, only one of which need be stated. The record does not show that the witness had any information of conditions in intervenor's home or in the home to which the child was to be taken. Intervenor also objects because several witnesses for defendant were permitted to state their opinion as to his fitness to have the custody, care and control of the child. Similar testimony was received and considered in determining the fitness of a father for the custody of his child in Stafford

v. Stafford, 299 Ill. 438, 446.

Intervenor also relies on the attempt of the deceased mother to designate him and his mother as guardians of the person of her child by her purported last will and testament under section 144 of the Probate Act (Ill. Rev. Stats. 1955, chap. 3, par. 296), which authorizes a parent of any minor and unmarried child to designate a guardian of the person of such child, to continue during his minority or for a less time. It also provides that "if the surviving parent is a fit and competent person no such designation shall deprive him of the custody, nurture, tuition, and education of the child or the right to designate by his will the guardian of the person of the child."

In his petition for modification of the divorce decree, intervenor alleged the appointment of intervenor and his mother as guardians of the person of the child by the last will and testament of the deceased mother. Defendant answered that a certified copy of the last will and testament was not attached to the petition, and defendant neither admitted nor denied the will, but demanded strict proof thereof. To his reply to defendant's petition for modification of the decree, the intervenor attaches a copy of the purported will of his sister. He does not, however, allege the admission of the will to probate—a condition precedent to its effectiveness for any purpose, nor does he prove its admission to probate.

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In considering intervenor's contention, we assume the validity and effectiveness of the will. So far as we can ascertain, the statute has never been construed as depriving the court granting a divorce of its control over the children of the divorced parties. In Wilkinson v. Deming, 80 Ill. 342 (1875), the court, in construing a statute authorizing the appointment of a testamentary guardian of a child, substantially the same as the present statute, held that by the decree of divorce for the fault of the father, granting the custody of the child of the parties to the mother, the child was no longer the child of the divorced father, but entirely under the control of the mother, and that the father could not attack the granting of letters of guardianship by the County court to the person designated by the last will of the mother as the testamentary guardian of the child. The construction of the statute announced in this case was approved in Peo. ex rel. Hanawalt v. Small, 237 Ill. 169 (1908), a habeas corpus proceeding for the custody of the child of ~~the~~ divorced parents. The mother had obtained a divorce for the father's fault and was awarded custody of the child. She died, leaving a will which was admitted to probate appointing her mother guardian of the child. The child was remanded to the custody of her maternal grandmother. In affirming the judgment the court, in speaking of the divorce decree, said:

"The decree, until modified, is conclusive as between the husband and wife and their representatives. Circumstances, if any exist, which might move the court to modify the decree cannot be considered in this proceeding but should be presented to the court by which that decree was rendered."

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13. *Chrysomelidae* (100)

Where a court has entered a divorce decree in which custody of a child is awarded to the mother, the court retains jurisdiction to modify the decree as to the custody of the child after the death of the mother. Jarrett v. Jarrett, 415 Ill. 126. Although the divorce is granted for the husband's fault and the custody of the child is given to the wife, the husband, after the wife's death, is entitled to preference over any other person who has no natural right to the child, provided the evidence shows that he is a competent person to have the custody of the child. Stafford v. Stafford, 299 Ill. 438. In that case a maternal aunt of the child contested the father's right to it. The father was awarded custody of the child, the court saying (p. 451) that the aunt had no natural right to the custody of the child or to visit it.

In this case the evidence supports the finding that the defendant is a fit and proper person to have full custody of his child. The court did not err in modifying the decree and granting custody of the child to the father. The court denied intervenor's motion for the right to visit the child. What was said in Stafford v. Stafford establishes the correctness of the denial of the intervenor's motion. The special circumstances existing in Lucchesi v. Lucchesi, 330 Ill. App. 506, a trust fund for the support of the minor, where the trustees of the fund were authorized to visit the child, are not present here. (See Ill. Rev. Stats. 1955, chap. 3, par. 295.)

The orders appealed from are affirmed.

ORDERS AFFIRMED.

FRIEND, P. J.. and BURKE, J.. CONCUR.

613 A

46900

HARRY BERNIER,

Appellee,

v.

CARL D. SCHAEFER,

Appellant,

and

RALPH B. BANDEROB,

Intervening Petitioner -

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

11 I.A. 244^{2d}

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Carl D. Schaefer, defendant, and Ralph B. Banderob, intervenor, seek the reversal of a default decree entered July 29, 1955, an order for a special execution entered August 18, 1955, and an order entered January 9, 1956 denying the separate petitions of the defendant and intervenor to vacate the default decree and subsequent order.

This suit was instituted June 8, 1955 by filing a complaint in chancery for the enforcement of a contract between plaintiff and defendant relating to an invention of defendant described in the complaint and hereinafter called the Schaefer Hydro Heat and Power Process. Personal service was had on defendant on June 11, 1955. July 5, 1955 defendant entered his personal appearance in the cause but filed no motion, answer or other pleading. July 29, 1955, pursuant to notice to defendant by mailing to him at 2338 Belmont Avenue, Chicago, Illinois a copy of the notice and a motion for default, an order was entered on motion of plaintiff for

judgment in default against defendant, the court having examined the verified complaint and having heard evidence in support thereof, ordering, adjudging and decreeing that the agreement between plaintiff and the defendant be specifically performed; that defendant forthwith deliver to plaintiff a working model of his Schaefer Hydro Heat and Power invention, together with the drawings, technical and patent information pertaining thereto--the working model need not be a finished product, but merely sufficient to demonstrate the principle of the invention; that defendant be restrained and enjoined from selling, assigning, or in any other manner disposing of his invention to any person or persons other than plaintiff until further order of the court; that defendant pay to plaintiff the costs of the suit, to be taxed. On August 18, 1955, on motion and affidavit and without notice to defendant, an order was entered that the sheriff of Cook county seize the working model of the Schaefer Hydro Heat and Power Process in defendant's possession and deliver the possession thereof to plaintiff, and that the clerk issue process appropriate to carrying out the order. Pursuant to this order and a special execution issued by the clerk, the sheriff seized the model and delivered same to plaintiff.

On September 6, 1955 defendant filed his verified petition to vacate the above mentioned orders, to dissolve the injunction, to quash the special writ of execution, and for other relief. The material allegations of this petition are that defendant had entered into an agreement with plaintiff and intervenor whereby the defendant, an inventor, was

to perfect the development of the Schaefer Hydro Heat and Power Process for plaintiff and intervenor; that on June 8, 1955 plaintiff filed a complaint in chancery against defendant; that defendant was served with a summons and on return day he, "a layman who has never outside of the above entitled cause been a party to any litigation," went to the office of the clerk of the Circuit court of Cook county in the County Building, Chicago, Illinois, and asked the deputy clerk in charge of filing what to do; that the deputy clerk filled out an appearance blank and told the defendant to sign the blank and pay \$5 for the appearance fee; that defendant did as directed and was then advised and assured by the deputy clerk that defendant did not have to file or do anything until the trial of the case; that defendant did not receive the notice of a motion for an order of default on July 29, 1955 shown by the affidavit of plaintiff's attorney to have been mailed to him on July 26th; that the order of July 29, 1955 was entered without notice to defendant that an injunction would be applied for; that defendant was served with a writ of injunction on August 9, 1955 but took no action thereon because he relied on the statement of the deputy clerk that the defendant's rights would not be adjudicated without a trial and that defendant would be given notice of the time of the trial; defendant had no notice whatsoever of plaintiff's application to the court for the issuance of a special execution on August 18, 1955; on August 20, 1955 an unfinished unit of the Schaefer Hydro Heat and Power Process device was taken by the sheriff of Cook county

from the defendant and delivered to plaintiff; defendant then realized that his rights were being prejudiced without a trial and he then consulted his attorneys who have been engaged in the preparation of the petition; that defendant has been misled by ^{the} act of the deputy clerk of the Circuit court of Cook county, as hereinbefore set forth.

Defendant denies that the agreement, a copy of which is attached to the complaint, is the agreement between the parties and says that the contract between them consists not only of the letter from plaintiff to defendant on May 5, 1954, but of Exhibits A, B, C, D and E, attached to and made a part of the petition, being, in addition to the letter of May 5, 1954, an agreement between plaintiff and intervenor to share alike in a contract then being negotiated by intervenor and defendant with reference to the Schaefer Hydro Heat and Power Process, and three letters from intervenor to defendant, endorsed by defendant as approved and accepted by him, stating terms of the contract between intervenor and defendant, including the ultimate undertaking of intervenor to loan to defendant for the development and distribution of defendant's invention the sum of \$25,000,000. Defendant also averred that plaintiff did not pay to defendant the consideration which he undertook to pay and that as a result thereof the working model embodying the Schaefer Hydro Heat and Power Process could not be completed by May 2, 1955, and that by reason of plaintiff's failure to deliver the necessary moneys, as agreed upon, plaintiff has failed to perform his obligations under the contract. Defendant prays that the

orders entered on July 29, 1955 and August 18, 1955 be vacated and set aside; that the injunction issued be dissolved, the property taken by virtue of the special execution be returned to the defendant, and that he be granted such other relief as the court shall deem meet and proper. September 15, 1955 plaintiff's motion to strike defendant's petition was filed in the clerk's office.

On September 20, 1955, by agreement of the parties, Banderob was given leave to intervene as a party and to file pleadings. On the same day he filed an intervening petition in which he asks that the orders of July 29, 1955 and August 18, 1955 be vacated and set aside. The allegations in this petition are not material on this appeal. On January 3, 1956 defendant filed a petition for relief under section 72 of the Illinois Practice Act. As no ruling was had on this petition, the contents of it are immaterial. On January 9, 1956 the court, having heard arguments of counsel and without hearing any evidence, denied the petitions of defendant and of intervenor, filed respectively on September 6 and September 20, 1955. By notice of appeal filed February 6, 1956 defendant and intervening petitioner appeal from the orders entered July 29, 1955, August 18, 1955 and January 9, 1956, and ask that said orders be reversed and that defendant and intervening petitioner be granted such other and further relief as the court shall deem meet.

As plaintiff's counsel say, this is an appeal under section 72 of the Civil Practice Act. The court had jurisdiction of the subject matter of the suit—specific performance

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1. The first of the three main branches of the theory of the mind is the theory of the faculties of the mind. This theory is the foundation of the whole system of psychology. It is the study of the powers of the mind, and of the manner in which they are exercised. It is the study of the faculties of the mind, and of the manner in which they are exercised. It is the study of the faculties of the mind, and of the manner in which they are exercised.

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of a contract and the granting of injunctive relief. It had jurisdiction of the defendant by personal service and the entry of his appearance. Although the court may have erred in entering the decree, it was not void for want of jurisdiction. A court of equity will set aside a decree after 30 days for fraud which prevents the court from acquiring jurisdiction, or which merely gives it a colorable jurisdiction. It will not vacate a decree for fraud occurring in the proceedings, such as false evidence, concealment and the like. Barnard v. Michael, 392 Ill. 130. No other fraud is charged in the petition or on appeal. We therefore ignore the charges of fraud in the petition. Furthermore, as the trial court is without power to review and correct its own errors more than 30 days after the entry of a final decree, we disregard as irrelevant and immaterial the argument of defendant and intervenor as to alleged errors by the trial court, such as the failure to enter an order of default before entering the default decree, granting relief not prayed for in the complaint, entering a decree of specific performance of a contract for personal services and granting specific performance where there is a lack of mutuality of remedy, or, on a vague, uncertain, indefinite contract unenforceable either in equity or at law.

What is said is not in conflict with Baglieri v. Hessling, 9 Ill. App. 2d 563, an opinion by this court, cited by the defendant and intervenor. A judicial opinion must be read as applicable only to the facts involved, and as an authority only for what is actually decided. City of Geneseo

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v. Illinois N. Utilities Co., 378 Ill. 506, 519. In the Baglieri case no question was raised as to the time the motion to vacate the default judgment was filed. Plaintiff's counsel argued that the sufficiency of the complaint must be attacked before judgment or it is waived. We were not required to and did not decide the right to move to vacate the default judgment after 30 days, merely because the complaint failed to state a cause of action.

The relief, if any, to be granted to the appealing parties must be under section 72 of the Civil Practice Act (Ill. Rev. Stats. 1955, chap. 110, par. 72) because of errors of fact which, if known to the trial judge at the time, would have prevented the entry of the decree. Defendant alleges that he was misled, by the statement of the deputy clerk of the court, ^{into} ~~xx~~, believing that he need take no further action until the case was reached for trial, and that he did not receive the notice mailed to him by plaintiff. The petition was denied on the motion of plaintiff to strike and without the hearing of any evidence. By the motion to strike, the alleged error--the failure to receive the notice--was admitted. Chapman v. North American Ins. Co., 292 Ill. 179, 186. The statements attributed to the deputy clerk by defendant were also admitted.

This suit involves an agreement for the development and distribution of defendant's invention, an undertaking which, according to the complaint, involves the advancement of \$25,000,000 by plaintiff to defendant. In equity and good conscience the rights of the parties should be determined

only after a full hearing and not by a decree entered by default. The defendant is an inventor, one of a group reputed to be notoriously incompetent in the practical affairs of life. It is not improbable that he relied on the statement of the deputy clerk, which, although erroneous, was undoubtedly innocently made. In any event, on the present record his failure to receive the notice of the motion for a default is admitted. After the working model of his invention was taken from him and he realized the seriousness of his position, he acted promptly in protecting his rights. His position raises an issue of fact as to the merits. Under the principle announced in Ellman v. De Ruiter, 412 Ill. 285, the motion of defendant to vacate the decree and the subsequent order should have been allowed, and the status quo of the parties, when the suit was started, restored. The rights of the intervenor, who is represented by the same counsel appearing for defendant, stand on a different footing. However, the granting of defendant's petition and the vacation of the decree and subsequent order will open the entire case for whatever proceedings may be necessary or advisable in intervenor's behalf.

The order denying the petitions to vacate the decree and the subsequent order is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

FRIEND, P.J. AND BURKE, J., CONCUR.

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46912

EDWARD E. RAUGSTAD,

Appellant,

v.

ELIZABETH L. TROCKE,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

11 I.A. 245^{2d}

JUDGE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, a licensed real estate broker, appeals from an order dismissing his complaint and entering judgment for defendant in his action for commissions in procuring a purchaser of defendant's property.

Plaintiff alleged his employment by defendant, the procurement of a written offer to purchase the property, its acceptance in writing by defendant, her later cancellation of the contract and refusal to pay a commission to plaintiff. The sole question on appeal is the validity and enforceability of the contract procured by plaintiff, a copy of which is attached to and made a part of the complaint. The purchaser's offer was on a printed form, headed "OFFER TO BUY REAL ESTATE," furnished by plaintiff. So far as is material on appeal, it reads as follows:

"To Owner Elizabeth L. Trocké

Address 3243 N. Neva

I hereby offer to purchase from you the real estate hereinafter described ***

Real Estate 1-1/2 story 4 bedroom, 2 bath residence

birch cab, kitchen, aluminum storms & screens,
stove and refrigerator

Street Number 3243 N. Neva

Size of Lot 30 x 125"

Defendant contends, and the trial court held, that the description of the property to be sold by defendant is

insufficient, there being no designation of the town or county in which the property is located, and that it is not described with sufficient particularity. Both sides cite the cases of Kopprasch v. Satter, 331 Ill. 126, and Kraus v. Campe, 328 Ill. App. 37. The latter case was an action, like the one before us, for real estate commissions, in which a contract describing the property by street number, without any reference to city, town, section, township, range, county or state, was held unenforcible for uncertainty and the recovery of commissions denied. This case cites, with other cases, the case of Kopprasch v. Satter, a suit for specific performance of a contract to sell real estate in which relief was denied because of the uncertainty of the description of the property in the contract. The rule stated by the court in the latter case (p. 128) is that

"A contract for the sale of land must definitely point out the land to be conveyed or furnish the means of identifying the land with certainty. If the contract fails in either of these respects a court of equity will not decree its specific performance. (Bowman v. Cunningham, 78 Ill. 48; Hamilton v. Harvey, supra; Winter v. Trainor, supra.)"

In reference to the particular contract before it, the court said:

"The instrument in question does not state in which city, county or State the 'property at 1332 Melrose St.' is situated, nor does it refer to such extrinsic facts as would aid in pointing out the property intended to be designated with any degree of certainty. There is no reference to ownership, occupation, or any other fact which would make the description apparently definite and by which it could be applied to some specific parcel of property. The description on its face is not definite."

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Other cases of like effect are Grocker v. Smith, 366 Ill. 535, Heroux v. Romanowski, 336 Ill. 297, and Weber v. Adler, 311 Ill. 547, pages 550-551. The contract before us is unlike the contracts in the cases cited, in that there is a specific designation of the defendant as the owner, of her address, of the street number of the property and its improvement with a residence, all indicating its occupation by defendant and giving information by which the description could be applied to specific property, namely, to residence property at a designated number on a certain street--the address of the defendant. The court erred in striking the complaint.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

FRIEND, P. J., and BURKE, J., CONCUR.

634 A

46808

EDWARD MARCH,

Appellant,

v.

MORRY HIRSHMAN,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

11 I.A. 245²

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action by an employee against his employer. At the close of plaintiff's case, the court directed a verdict for defendant. Judgment was entered on the verdict and plaintiff has appealed.

Plaintiff was on June 3, 1950, a maintenance man for Banner Cleaners and Dyers, Inc., in Chicago. Defendant was Secretary-Treasurer of the corporation and manager of the plant. On that day defendant ordered plaintiff to defendant's home to "unclog the drain on top of the front sun porch and install a leaf catcher." In the course of descending from the roof of the house, plaintiff fell and was injured.

The question of law before us is whether the court erred in directing the verdict for defendant. We apply the familiar rule on this question and consider only evidence favorable to plaintiff together with legal inferences drawn therefrom most strongly in his favor, reject contradictory and contrary evidence, and decide whether there is any evidence tending to prove plaintiff's due care and defendant's negligence proximately causing plaintiff's injuries (Lindroth v. Walgreen Co., 407 Ill. 121; Simmons v. South Shore

Hospital, 340 Ill. App. 153.); and to sustain the court's ruling, "it must appear not only that the facts bearing on such question are not in dispute, but also that reasonable men would draw the same inference from such undisputed facts." (Seeds v. Chicago Transit Authority, 409 Ill. 566, 570.)

Plaintiff was the sole witness to the facts of the accident. Under defendant's orders, he went to the house, where he obtained a six foot folding ladder from the basement. He was not offered any tools or instrumentalities to be used in performing the work, and there was no other ladder available on the premises.

The roof of the front sun porch was ten feet from the ground. When plaintiff used the ladder to reach the top, he had to reach up four feet to the coping of the porch and pull himself up and on to the roof. After opening the drain pipe and installing the leaf catcher, plaintiff returned to that part of the roof above the ladder and proceeded to climb down, as he stated it, by putting his leg "over the coping, and took hold of the coping, and stepped on that brick work to reach the ladder with my other foot, and this coping raised up to give way and swing around, and I dropped myself on the ladder, and I gave myself a push over, and landed on the sidewalk." The ladder used by plaintiff, "like all folding ladders," was a "little wobbly" and when he stepped on it, being "afraid the ladder and coping would come down on me, I tried to boost myself as far away as I could, and then the walk . . . is where I landed"

On the question before us we consider the physical facts and therefore the fact of the window leading from the house 14 inches above the roof of the porch, which was plaintiff's goal. There is only one inference reasonable from this fact: the window was an alternative to the ladder, offering little or no hazard. This inference, in itself neither favorable nor unfavorable, must therefore be drawn by the judge, even though it may lead to plaintiff's disadvantage.

The question now is whether the jury should have been given the opportunity to draw an inference that plaintiff should have used the ladder when the safe means was available, for there is no testimony in plaintiff's favor which, taken as true, would support a legitimate inference that the window was not available. We think not, because in our opinion, reasonable men could come only to the conclusion that plaintiff was lacking in due care in using the ladder (Beidler v. Branshaw, 200 Ill. 425, 431.) in the absence of testimony that he was directed by defendant to use it.

Plaintiff argues here that he was not allowed to explain to the jury that he was denied access to the window. The record shows that the court sustained several objections to questions whether plaintiff was "allowed" or "permitted" to enter the house by the housekeeper or use means other than the ladder. We think the court properly sustained objections to questions of this kind and plaintiff made no offer of proof by proper evidence that he had no alternative to the ladder.

But even if the proof were made that he had been denied by the housekeeper access to the window alternative, can a favorable inference be drawn that he was prudent in using the ladder without proof that he sought to have defendant order the housekeeper to allow him to enter the house and use the window? We again are of the opinion that all reasonable men would say that he was imprudent in doing so (Simmons v. Chicago & Tomah R. R. Co., 110 Ill. 340, 347.), since there is no evidence that he sought defendant's aid.

Reasonable men might differ as to whether plaintiff was or was not negligent in his conduct as he attempted to descend from the roof, but this is a secondary consideration. The primary question is not how he conducted himself after an imprudent decision to use the ladder, as we have stated it, but whether he was or was not negligent in using the ladder.

We think that the trial court correctly directed the verdict because the evidence is so clearly insufficient to establish plaintiff's due care "that all reasonable minds would reach the conclusion that there was contributory negligence." (Ziraldo v. Lynch Co., 365 Ill. 197, 199.) Plaintiff knew or should have known the risk in using a six foot ladder to reach a ten foot roof. Where the danger would be obvious to a person of ordinary intelligence, the law will charge the complaining party with knowledge of the danger. (C. & E. I. R. R. Co. v. Heerey, 203 Ill. 492, 497.) We think the plaintiff failed to exercise ordinary caution in respect to his own safety. This case does not come within the provisions of the Scaffolding Act (Chap. 48, Par. 60 et seq., Ill. Rev. Stat., 1955.) so as to eliminate elements of due care as

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CHICAGO, ILL., U.S.A.

VOLUME 10, NUMBER 1

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announced in Fetterman v. Production Steel Co., 4 Ill. App. 2d 403.

Under our conclusion, we need not decide whether defendant knew or should have known that the coping was loose, or whether failure to warn plaintiff of this fact constituted negligence. Therefore, the judgment is affirmed.

AFFIRMED.

LEWE, P.J., AND FEINBERG, J., CONCUR.

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46894

ALBIN KASPER,

Counter Claimant - Appellant,

v.

RICHARD BUELICK,

Counter Defendant - Appellee.

APPEAL FROM

COUNTY COURT,

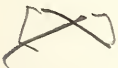
COOK COUNTY.

2d
11 I.A. 246

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Kasper, counter claimant, from a judgment upon a directed verdict for Buelick, counter defendant, in a property damage action.

Kasper, on January 17, 1952, about 6:45 a.m., was driving his automobile west on Diversey, and Buelick was driving his automobile south on Kimball Avenue. The automobiles collided at the six-corner intersection of Diversey, Kimball, and Milwaukee Avenues. Kasper's automobile was thrown against the windows of a Woolworth Company store on the south side of Diversey.

 The question of law presented is whether, considering only the evidence favorable to Kasper, together with all reasonable inferences drawn most strongly in his favor, there is any evidence tending to prove the elements of the case.

(Lindroth v. Walgreen Company, 407 Ill. 121; Simmons v. South Shore Hospital, 340 Ill. App. 153.)

The evidence favorable to Kasper is that he entered the intersection with a green light and was struck by Buelick's automobile at the west boundary of the intersection. The favorable inferences are that Kasper was in the exercise of due care in entering the intersection and that Buelick

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negligently entered the intersection against the red light and that this negligence was responsible for the collision. This was sufficient prima facie evidence on the question of due care, negligence, and proximate cause. (Gorgone v. Hicks Oil & Hicks Gas, Inc., 345 Ill. App. 328, 332.)

Kasper observed the damage to his car after the impact and saw the damage to the right front wheel and the body of the car, which was almost brand new. The car was taken to a garage. Kasper saw the amount of work necessary, discussed this with the service manager, and an estimated order for repairs was signed by him. The car was repaired in three weeks and he paid the bill of \$521.31.

~~X~~ We think that there is no merit to Buelick's contention that there was no proof of a causal connection between the money paid by Kasper and any damage suffered in the collision. Kasper is entitled to the inferences which establish this connection. It is our opinion also that there was some evidence of monetary damages. There is no point made that the court erred in permitting Kasper to testify that he paid the bill, and a receipted bill was not put into evidence. Buelick admits that a receipted garage bill is not the only method of proving damage but claims that Kasper was required to prove through an expert that the repairs were necessary and the cost reasonable. ||

~~X~~ Kasper was experienced in automobile mechanics, had repaired cars during the previous twelve years for himself and others, and had purchased parts and was acquainted with prices. We infer in his favor that he would not pay more than

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market value for repairs. (Behn v. Southern Pacific Co.,
2 Ill. App. 2d 62, 65.)

We conclude that there was evidence tending to
prove the elements of plaintiff's case and damages, and it
follows that we think the trial court's ruling was erroneous.
The case should have gone to the jury. The judgment for
Buelick is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LEWE, P.J., AND FEINBERG, J., CONCUR.



OK. *R.M.E.* 639-A
Abstract

General No. 10871

Agenda No. 2

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

11 I.A.^{2d} 247¹

February Term, A. D. 1956

JOHN T. BLINCOE,
Plaintiff-Appellant,
vs.
CURTIS C. MILLER, JR.,
Defendant-Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
DU PAGE COUNTY,
ILLINOIS.

DOVE, P. J.

John T. Blincoe, on March 6, 1953, filed his complaint in the Circuit Court of Du Page County against defendant, Curtis C. Miller, Jr., seeking to recover damages for the loss of his automobile and for personal injuries which he sustained as a result of an automobile collision which occurred on January 2, 1953. His complaint alleged both negligence and wilful and wanton misconduct on the part of the defendant. The appearance of the defendant was entered by his attorneys and an answer filed, which denied that defendant was guilty of any negligence or wilful or wanton misconduct as alleged. Defendant also filed a counterclaim against the plaintiff in which he charged the plaintiff with both negligence in the operation

Abstract

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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STOWELL, JR. DIED FEB. 27, 1992

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Doc. 1. 6

James H. Wilson, no more than 1930, living in
connection in the United States at the time of the
deposition, that he is a resident of the
District of Columbia and the
jurisdiction will be exercised as a result of an agreement
collusion with certain persons in 1930. The committee
allowed both parties and after the same agreement
on the part of the defendant. The committee of the defendant
was entered by the plaintiff and the same time, which
during that defendant was guilty of any negligence or
willful or negligent conduct as alleged. Defendant also
filed a counterclaim against the plaintiff in which he
alleged that plaintiff was guilty of the same

of his car and also with wilful and wanton misconduct upon the occasion in question and sought to recover damages for personal injuries which he sustained as a result of the collision. To this counterclaim, plaintiff filed a reply and the issues made by the complaint, answer, counterclaim and reply were submitted to a jury, resulting in verdicts finding the defendant and also the counter-defendant not guilty. Motions for a new trial and for judgment notwithstanding the verdicts were made by both parties and overruled and the record is before us for review upon the appeal of the plaintiff and cross-appeal of the defendant.

It is insisted by counsel for appellant (1) that the verdict was the result of misconduct of counsel for defendant; (2) that the verdict is contrary to the manifest weight of the evidence; (3) that the trial court erred in not directing a verdict for counter-defendant upon the counter-claim; and (4), that the trial court erred in refusing to give one instruction and erred in giving other instructions.

Counsel for appellee insists that the collision was the result of an unavoidable accident without the fault or negligence of either party and that the plaintiff was guilty of contributory negligence or of wilful and wanton misconduct which was the sole proximate cause of the occurrence.

The record discloses that after the jury had been selected, sworn and the opening statements made, the plaintiff called, as an adverse witness, the defendant and counterclaimant, Curtis C. Miller, Jr., who testified that he was attending school at the time of the accident and that the car he was driving that morning was a 1949 Kaiser Fordoor, the title of

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the results are shown in Table 1. The results show that the model is able to predict the results of the experiments with a high degree of accuracy.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

which was in his father; that at the time of the accident he was seventeen years of age and at the time he testified he was nineteen years of age and a senior at Marmion Military Academy in Aurora, Illinois, and that about a month or five weeks after the accident he returned to his regular classes at this school. The record further discloses that during the course of the trial the defendant was referred to by some of the witnesses as a lad, a boy and a child only seventeen years old.

Collins v. Hastings, 283 Ill. App. 304, was an action brought by Ruby Collins, Administratrix of the estate of her deceased son, to recover for his wrongful death. The defendants were John Hastings, Sr., and Donald Hastings. The evidence disclosed that at the time of the accident, Donald was sixteen years of age and driving his father's car. No guardian ad litem was appointed by the trial court for Donald Hastings and upon an appeal to this court, it was insisted that it was error for the trial court to proceed with the trial of the cause without first appointing a guardian ad litem for the defendant, Donald Hastings. Counsel for appellee contended, however, that this omission was not called to the attention of the trial court, was not raised in appellant's motion for a new trial and that it couldn't be raised for the first time in this court. This court held, however, that the failure to appoint a guardian ad litem was an error which the minor could not waive in the trial court and in the course of its opinion, the court cited the early case of Peak v. Shasted, 21 Ill. 137, which held that a minor can only appear to defend by a guardian and not

which was in his hand; that at the time of the shooting
he was approximately twenty years of age and at that time he resided
at the highest house of the city and a number of houses in the
vicinity of the city, Illinois, and that about a month or two
before the shooting he resided in the highest house
of the city. The witness further testified that during
the course of the trial the witness was informed by the
jury of the witness as a fact, a day or two before
the witness gave his testimony.

Collier v. Collier, 1901, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

in person or by attorney and that a judgment rendered without any guardian is voidable and quoted 22 Cyc. 636, where it is said: "The record should affirmatively show that a guardian ad litem was appointed to appear and answer for infant parties, otherwise the judgment or decree will be reversed on error or appeal."

The same rule applies in equity proceedings.

Thurston v. Tubbs, 250 Ill. 540, was a bill to quiet title. A minor was sole defendant and answered by his attorney. The court declined to determine the merits of the controversy, stating that it would be improper to do so until the minor defendant had an opportunity to be heard by a guardian ad litem appointed by the court to properly protect his interest.

In Kroot v. Liberty Bank of Chicago, 307 Ill. App. 209, at page 214, it was stated that the law requires that evidence must be introduced either for or against a minor whose rights are to be considered and that it is essential that the proper pleadings be filed in the trial court and evidence submitted in relation thereto after a guardian ad litem is appointed who will protect the interests of the minor.

In Skaggs v. Industrial Commission, 371 Ill. 535, it was said (p. 542) that a minor cannot bring a legal proceeding nor engage in one in person or by an attorney, but must appear by a guardian, guardian ad litem or a next friend and that where no guardian or next friend of a minor appears, it is the duty of the court to appoint one and that any action taken at law or in equity against a minor without such representation is voidable.

As a result of the above, the Commission has decided to

THEY ARE NOT

1. The first question is whether the defendant is a person who is entitled to the protection of the Fourth Amendment. The answer is yes. The defendant is a person who is entitled to the protection of the Fourth Amendment.

It was said (p. 144) that a woman named Mary had been seen
sitting near the door to the house in which the body was found,
and that there was a possibility of her being the person who
it is the duty of the police to find out who she was and
take it into account in their investigation.

No guardian ad litem was ever appointed by the trial court for Curtis C. Miller, Jr.. He appeared in that court by counsel and filed an answer to the complaint and also a counterclaim, not by guardian, next friend or guardian ad litem. He also filed a notice of cross-appeal from the judgment rendered against him on his counterclaim. He filed in this court his brief and argument, additional abstract and amendment thereto in his own proper person by his counsel. In this state of the record, no good purpose would be served by reviewing the evidence or considering any of the errors relied upon for reversal. Under the authorities, the judgments are voidable and must be reversed.

The judgment in favor of the defendant in response to the issues made by the original complaint and answer is reversed, as is also the judgment rendered in favor of the counter-defendant upon the issues made by the counterclaim and reply thereto and this cause is remanded to the Circuit Court of Du Page County, Illinois, for further proceedings not inconsistent with this opinion.

Judgments reversed and cause remanded.

Crow J. Concurs.
Corvaldi, J. Concurs

The following is a list of the names of the persons who have been appointed to the various positions in the various departments of the Government of the State of Illinois, for the year 1900.

George J. Brown
George J. Brown

Agenda No. 20

General No. 10946

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

11 I.A. 247²

May Term, A.D. 1956

ELIZABETH WILLIAMS,
Plaintiff-Appellant,
vs.
ARTHUR FREDENHAGEN,
Defendant-Appellee.

Appeal from the
Circuit Court of
DuPage County,
Illinois.

DOVE, P. J.

The record in this case shows that on November 17, 1951, Elizabeth Williams filed in the circuit court of Du Page County her affidavit requesting the circuit clerk to issue a writ of seire facias directed to Arthur Fredenhagen and praying that a judgment rendered in favor of Martha Thomas and against Arthur Fredenhagen on November 19, 1931, for the sum of \$1332.50, together with costs, be revived. On the same day a writ of seire facias was issued and duly served on the defendant on November 19, 1951, who appeared and filed a motion to dismiss on the ground that the plaintiff had no interest in the judgment. Before this motion was heard, plaintiff moved for leave to amend her affidavit and the writ of seire facias/thereon^{issued} and that an amended writ of seire facias be issued retroactive

FILED

AUG 27 1936

WILLIAM R. RICHARDSON
CLERK PROTESTANT
Associate Clerk Section D-1

STATE OF NEW YORK

In SENATE

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

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COMMISSIONERS OF THE
LAND OFFICE
ALBANY, N. Y.

ALBANY, N. Y.
JANUARY 1, 1937
OFFICE OF THE
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LAND OFFICE

THE COMMISSIONERS OF THE LAND OFFICE HAVE THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE FOR THE YEAR 1936, AND TO STATE THAT THE SAME HAS BEEN FILED IN THE OFFICE OF THE CLERK OF THE SENATE, AND THAT THE SAME IS NOW AVAILABLE FOR THE USE OF THE SENATE. THE COMMISSIONERS OF THE LAND OFFICE HAVE THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONERS OF THE LAND OFFICE FOR THE YEAR 1936, AND TO STATE THAT THE SAME HAS BEEN FILED IN THE OFFICE OF THE CLERK OF THE SENATE, AND THAT THE SAME IS NOW AVAILABLE FOR THE USE OF THE SENATE. THE COMMISSIONERS OF THE LAND OFFICE HAVE THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONERS OF THE LAND OFFICE FOR THE YEAR 1936, AND TO STATE THAT THE SAME HAS BEEN FILED IN THE OFFICE OF THE CLERK OF THE SENATE, AND THAT THE SAME IS NOW AVAILABLE FOR THE USE OF THE SENATE.

1937

THE COMMISSIONERS OF THE LAND OFFICE HAVE THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONERS OF THE LAND OFFICE FOR THE YEAR 1936, AND TO STATE THAT THE SAME HAS BEEN FILED IN THE OFFICE OF THE CLERK OF THE SENATE, AND THAT THE SAME IS NOW AVAILABLE FOR THE USE OF THE SENATE.

to the date of the filing of the original affidavit and writ. Upon a hearing the trial court denied plaintiff's motion to amend and granted defendant's motion to dismiss. Upon appeal, that order was reversed and the cause remanded to the circuit court with directions to allow the plaintiff to amend her affidavit and writ of scire facias (Williams v. Fredenhagen, 350 Ill. App. 26).

Upon the reinstatement of the cause in the circuit court, an amended affidavit was filed ~~XXXXX November 17, 1931~~ and an amended writ of scire facias issued nunc pro tunc as of November 17, 1951. The defendant answered alleging payment and invoking the twenty-year statute of limitation. Thereafter, by leave of court, plaintiff filed on January 12, 1956, her second amended complaint which alleged that on November 19, 1931, she obtained a judgment against defendant for \$1332.50 and costs; that except for the payment of \$50.00 said judgment remains wholly unpaid; that on November 17, 1951, there was due the plaintiff from the defendant, after giving credit for said payment of \$50.00, the sum of \$2620.00 for which amount plaintiff prayed judgment, together with interest on \$1332.50 from November 17, 1951, to the date of entering judgment herein.

Upon the grounds that the second amended complaint was an action in debt and an entirely new and different action than the original scire facias proceeding and, as it appeared from the amended complaint, that more than twenty years had elapsed since the judgment was rendered, defendant moved to dismiss the proceeding. Upon a hearing the court sustained this motion and, plaintiff having elected to stand on her pleadings, an appropriate

final judgment was rendered in bar of the action, and plaintiff appeals. The same day the notice of appeal was filed the parties filed in the trial court a stipulation which, after setting forth the proceedings as herein outlined, concluded: "The parties agree that the primary question to be determined by this appeal is whether suit commenced in scire facias can, by amendment, be changed to debt."

It is the contention of appellant that she brought her action as a judgment creditor in apt time; that in a scire facias proceeding the writ stands as the complaint to which the defendant must plead; that by her second amended complaint she simply changed the form of her action from scire facias to an action as provided by the Practice Act in order to enable her to sustain her claim for which her suit was brought, namely, the money due her from the defendant under the judgment rendered in her favor on November 17, 1931.

Counsel for appellee insists that by Section 55 of the Practice Act plaintiff was given the option to (a) bring her action as an ordinary civil action by filing her complaint and having a summons issued as in other cases or (b) to revive her judgment by the common law writ of scire facias, as provided by Section 24B, Chapter 38, Illinois Revised Statutes; that plaintiff initiated this proceeding as a scire facias action; that her second amended complaint was an action in debt based upon the same judgment plaintiff sought to revive by scire facias; that she did not procure the revival of her judgment within twenty years after its rendition and, therefore, it has lost its vitality.

As we view it, and as the parties have so stipulated, the primary question presented by this record is whether or

These arguments are contained in two of the letters, and the following
answers. The first of the letters is dated the 11th day
of the month of the year 1811, and is addressed to the
Honorable John Jay, Governor of the State of New York.
The second letter is dated the 11th day of the month of the year
1811, and is addressed to the Honorable John Jay, Governor of the
State of New York.

It is the intention of the undersigned to send the following

letter to the Honorable John Jay, Governor of the State of New York,
containing the same. The letter is dated the 11th day of the month
of the year 1811, and is addressed to the Honorable John Jay,
Governor of the State of New York. The letter is dated the 11th day
of the month of the year 1811, and is addressed to the Honorable
John Jay, Governor of the State of New York. The letter is dated the
11th day of the month of the year 1811, and is addressed to the
Honorable John Jay, Governor of the State of New York.

The undersigned has the honor to be, Sir, your obedient servant,

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not the plaintiff, having instituted a scire facias proceeding to revive a judgment prior to the expiration of the twenty-year statute of limitations, has a right to file an amended complaint in debt on the same judgment and proceed thereunder after the twenty-year statute of limitations has expired.

In *Smith v. Carlson*, 8 Ill. 2d 74, 132 N.E. 2d 513, it appeared that the appellate court had affirmed an order of the circuit court of Cook County dismissing a scire facias proceeding to revive a judgment holding that the revivor judgment must be within twenty years next after the date of the judgment. In reversing the judgment of the appellate court, the Supreme Court said that the issue presented was whether a judgment might be revived in a scire facias proceeding where the affidavit for revival of the judgment had been filed and the original scire facias writ had been issued before the expiration of the twenty-year limitation period, but an alias scire facias writ with a return day after said limitation period has been issued after the expiration of the twenty-year period. In its opinion the court called attention to Section 25 of the Limitations Act (Ill. Rev. Stat. 1953, chap. 83, par. 24B) which provides in substance that judgments in any court of record in this state may be revived by scire facias or by ordinary civil action in lieu of scire facias as provided by the Civil Practice Act, or a civil action may be brought thereon within twenty years next after the date of the judgment; that actions to revive judgments by scire facias shall be commenced by affidavit setting forth a description of the original judgment, its title, date and amount, together with a statement of any partial satisfaction thereof and that the clerk shall file such affidavit as a separate action and that

upon the commencement of any action to revive a judgment by scire facias the clerk of the court shall enter upon the judgment docket record of the original judgment a notation of the commencement of such scire facias action.

In the Carlson case the appellant contended that this statute makes no distinction between scire facias and an action on the judgment in permitting the revival of the judgment if the action is brought within twenty years next after the date of the original judgment and that the new judgment in either proceeding may be entered before or after the expiration of the twenty-year limitation period. The appellee argued that a scire facias proceeding to revive a judgment was merely a continuation of the old action to revive the judgment just as it formerly existed and the revivor must be before the judgment expires; that is, within twenty years next after the date of the judgment. In disposing of the issue, the Supreme Court said (page 77): "We see no reason why there should be any distinction between the two concurrent remedies for the revival of a judgment provided by our statute and we do not believe the legislature intended any such distinction. Our statute provides 'Judgments *** may be revived by scire facias, or by ordinary civil action in lieu of scire facias as provided by the Civil Practice Act, ***.' Section 55 of the Civil Practice Act provides: 'It shall not be necessary to use a writ of scire facias, but any relief which heretofore might have been obtained by scire facias may be had by employing an ordinary civil action at law.' (Ill. Rev. Stat. 1953, chap. 110, par. 179.) The legislature apparently regarded a scire facias proceeding and the civil action in lieu thereof as concurrent and identical remedies."

that the Government of the United States is not bound by the decision of the Supreme Court in the case of the United States v. Smith, 100 U.S. 147, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960

The amendment of pleadings is governed by Section 46 of the Civil Practice Act (Ill. Rev. Stat. 1953, chap. 110, par. 170). Paragraph 1 of this section provides: "At any time before final judgment in a civil action, amendments may be allowed on such terms as are just and reasonable, introducing any party who ought to have been joined as plaintiff or defendant, discontinuing as to any plaintiff or defendant, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross demand." Paragraph 2 of said section 46 provides in substance that the cause of action set up in any amended pleading shall not be barred by lapse of time under any statute limiting the time within which an action may be brought if the time prescribed has not expired when the original pleading was filed, and if it shall appear from the original and the amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction set up in the original pleading.

Under these provisions it is permissible to change the form of the action so as to enable plaintiff to sustain the claim for which the action was originally intended to be brought and the amended pleading relates back to the time of the filing of the original pleading and if the statute of limitations had not expired at that time, the cause of action was preserved. In this case, the second amended complaint changed the action from *scire facias* to an ordinary civil action

THE UNIVERSITY OF CHICAGO

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919,

1940-1941

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11. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

197-218-3, (Phone the case of which is below is 197-218-3)

Yusuf M. Sidani, *Professor of Management Science, American University of Beirut, Lebanon*

of term of subject was, in my opinion, affected by the following:

which may enable the scientist to obtain the best possible

It was intended to be printed as the document is with

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U.S. GOVERNMENT PRINTING OFFICE: 1969

any, including a list of the names of the persons who have been

(continued from page 6)

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THE FORM OF THE ACTION IS AS TO WHICH AFFECT IS NOT

THE (C) 1994 BY THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF REALTORS

Approved by the Board of Directors on _____

To estimate all 91 the variables, including all 70 and all 121 and

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at law and was brought to sustain the same claim for which the original writ of scire facias was sought.

In Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222, the court had occasion to construe paragraph 2 of Section 46 of the Civil Practice Act and said: (p. 229) "The sole requirement of that paragraph is that the cause of action set up in the amendment grew out of the same transaction or occurrence set up in the original pleading. ^{Briefly} ~~XXXXXX~~ summarized, Section 46 permits any amendment of a pleading, filed in apt time, after the time limited for commencing suit to set up a cause of action on any claim which was intended to be brought by the original pleading, provided, only, that it grew out of the same transaction or occurrence, and it is not necessary that the original pleading technically state a cause of action, or that a cause of action set out in the amendment be substantially the same as any cause of action stated in the original pleading. The term 'same transaction or occurrence,' so used in the statute, means the same suit."

In the instant case, the original affidavit for the writ of scire facias was filed in apt time. The next question then is whether or not the writ of scire facias and the cause of action stated in the second amended complaint arise out of the same transaction or occurrence. It cannot be argued that they do not. The scire facias proceeding and the civil action had for their object the collection of the judgment which the plaintiff acquired against the defendant on November 19, 1931, in the circuit court of DuPage County. The original scire facias proceeding and the second amended complaint stem from the same proceeding which was the action of the plaintiff

It has not been necessary to establish the facts about the original writ of habeas corpus in this case.

In *Ex parte* (1891) 141 U.S. 297, 100 U.S. 457.

In *Ex parte* (1891) 141 U.S. 297, 100 U.S. 457.

Section 44 of the Civil Rights Act of 1875 (18 U.S.C. 242).

The only question of law presented is that the writ of

habeas corpus is not available in this case.

or otherwise and so in the case of *Ex parte* (1891) 141 U.S. 297, 100 U.S. 457.

Section 44 permits the writ of habeas corpus in the

case, after the writ has been granted, and in the case of

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in the case of habeas corpus, which is not available in the case of

against the defendant originally filed in the circuit court. Plaintiff's second amended complaint related back to the time of the filing of her Affidavit for the writ of scire facias, which was November 17, 1931, which was within twenty years next after the date of the judgment.

In our former opinion (Williams v. Fredenhagen, 350 App. Ill./26) at page 36, we said: "Finding as we have that she (the plaintiff) was the original judgment creditor, who obtained a valid judgment against the defendant on November 19, 1931, it appears to us that under the facts the plain meaning of the Civil Practice Act prevented her from losing her suit by limitation. The purpose of this Section (46) of the Civil Practice Act is to prevent a party to a suit by inadvertence in the language of a pleading from losing his right of action by limitations between the time the complaint was filed and the time of the amendment. The statute should be construed broadly to carry out its purposes permitting liberal amendments to pleadings."

The trial court erred in sustaining the motion of the defendant to dismiss plaintiff's second amended complaint. The judgment appealed from is reversed and this cause is remanded to the circuit court of DuPage County with directions to overrule the motion of defendant to dismiss and for further proceedings in accordance with this opinion.

Judgment reversed ^{cause} and/remanded
with directions.

*J. Earl
concur.*
Eveldi J. Concur.

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[illegible]

The first court view is a view of the building from the street. The building is a two-story structure with a flat roof. The building is made of brick and has a large sign on the front. The sign is for the "HOTEL" and is in large letters. The building is surrounded by other buildings and trees. The street is in front of the building. The view is from the street looking at the building.

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Abstract

6507

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

MAY TERM, A.D. 1956

General No. 10050

Agenda No. 7

Avis DeLong,

Plaintiff-Appellee,

vs.

Elsie Whitehead and Elvy Rook,

Defendants.

* * *

Elsie Whitehead,

Defendant-Appellant.

11 I.A. 330^{2d}

Appeal from

Circuit Court of

Greene County

Per Curiam.

Avis DeLong, plaintiff, filed suit in the Circuit Court of Greene County on June 24, 1954 against Elsie Whitehead and Elvy Rook, defendants. Count 1 of the complaint alleged a cause of action against Elsie Whitehead under the Dram Shop Act. (Sec. 135, Chap. 43, Ill. Rev. Stat. 1953.) Count 2 alleged a cause of action against Rook for the recovery of damages sustained by the plaintiff while riding as a guest in his automobile. The cause was tried

1930

STATE OF ILLINOIS

IN SENATE

LEGISLATIVE COURT

JANUARY 1, 1930

Assembly No. 7

General No. 10050

11 I.A. 380

Transcript from

Circuit Court of

Greene County

Plaintiff-Appellee,

vs.

State of Illinois and City of Chicago,

Defendants.

State of Illinois,

Plaintiff-Appellant.

for Cause.

State of Illinois, Plaintiff, filed suit in the Circuit Court of
 Greene County on June 26, 1929 against State of Illinois and City
 of Chicago, Defendants. Count 1 of the complaint alleged a cause of
 action against the State of Illinois under the State Tort Act. (Ill. Rev. Stat. 1927, c. 111, § 103.) Count 2 alleged a cause of action
 against the City of Chicago for the recovery of damages sustained by the plaintiff
 while riding as a guest in his automobile. The cause was tried

before a jury which returned a verdict in the sum of \$10,000 against both defendants. Elsie Whitehead alone has perfected an appeal to this court.

Appellant contends (1) that the verdict is against the manifest weight of the evidence (2) that the court erred in giving plaintiff's instructions 8, 9 and 19 and in refusing defendant's instruction 39 and (3) that the court erred in not requiring separate verdicts as to each count of the complaint.

In support of her contention that the verdict is against the manifest weight of the evidence, defendant contends that the finding of intoxication on the part of Rook is not supported by a preponderance of the evidence. There is no conflict in the evidence as to the fact that Rook was drinking in the afternoon and evening prior to the happening of the accident in question. There is some conflict as to the amount of intoxicating liquor that he drank. Rook testified to being in defendant's tavern from 4:30 or 5:00 P.M. until 6:30 P.M. Here, he said, he drank two bottles of beer and then qualified his testimony to say that he didn't remember whether or not he drank the second bottle. Defendant admitted serving him two bottles. Rook admitted having a mixed whiskey drink at the

before a jury which returned a verdict in the sum of \$10,000
against both defendants. While Whitted alone has perfected an
appeal to this court.

Appellant contends (1) that the verdict is against the
manifest weight of the evidence (2) that the court erred in giving
plaintiff's instructions 8, 9 and 12 and in refusing defendant's
instruction 39 and (3) that the court erred in not refusing
separate verdicts as to each count of the complaint.

In support of her contention that the verdict is against
the manifest weight of the evidence, defendant contends that the
finding of intoxication on the part of Hook is not supported by a
preponderance of the evidence. There is no conflict in the evidence
as to the fact that Hook was drinking in the afternoon and evening
prior to the happening of the accident in question. There is some
conflict as to the amount of intoxicating liquor that he drank.
Hook testified to being in defendant's tavern from 4:30 or 5:00 P.M.
until 8:30 P.M. Here, he said, he drank two bottles of beer and
then qualified his testimony to say that he didn't remember whether
or not he drank the second bottle. Defendant admitted serving him
two bottles. Hook admitted having a mixed whiskey drink at the

home of Betty Lawson. Betty Lawson testified he had two such drinks. The accident happened soon after plaintiff and Rook left Betty Lawson's home.

The ambulance driver, who took plaintiff and Rook to the hospital, detected something that smelled like alcohol, about the person of Rook at the scene of the accident.

The witness Betty Lawson testified that in her opinion Rook was intoxicated while at her home. She based this on his conduct, demeanor, language and tone of voice while there, which she described. The plaintiff testified that Rook did not appear to her to be intoxicated when they left Betty Lawson's home. While riding in the car she formed the opinion that he was intoxicated as a result of the manner in which he drove and his failure to heed her admonition to drive slower. Several witnesses testifying on behalf of defendant said that Rook was sober in the afternoon while in defendant's tavern. Others testified that they did not notice anything unusual about his condition after the accident occurred. Rook himself testified that his faculties were in no way impaired.

The amount of liquor that a person has to drink is not the controlling factor. The effect of alcohol upon all persons is not the same. Although an individual may not give any outward

home of Betty Lawson. Betty Lawson testified he had two more
drinks. The accident happened soon after plaintiff and Lawson
left Betty Lawson's home.

The ambulance driver, who took plaintiff and Lawson to the
hospital, detected something that smelled like alcohol, about the
person of look at the scene of the accident.

The witness Betty Lawson testified that in her opinion
Book was intoxicated while at her home. He passed this on his
conduct, demeanor, language and tone of voice while driving, which
she described. The plaintiff testified that Book did not appear
to her to be intoxicated when they left Betty Lawson's home. While
riding in the car she formed the opinion that he was intoxicated
as a result of the manner in which he drove and his failure to
keep her attention to drive slower. Several witnesses testifying
on behalf of defendant said that Book was sober in the afternoon
while in defendant's tavern. Others testified that they did not
notice anything unusual about his condition after the accident
occurred. Book himself testified that his faculties were in no
way impaired.

The amount of liquor that a person has to drink is not
the controlling factor. The effect of alcohol upon all persons
is not the same. Although an individual may not give any outward

or visible signs to the casual observer that he is drunk, yet if he is under the influence so as not to be at himself, so as to be excited from it and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated. Osborn vs. Leuffgen, 381 Ill. 295, 45 N.E.(2d) 622. The trial court did not err in permitting plaintiff and the witness Betty Lawson to give their opinion as to Hook's intoxication. Dimick vs. Downs, 82 Ill. 570, Suppe vs. Sako, 311 Ill. App. 459, 36 N.E.(2d) 603, and Cox vs. Hraskey, 318 Ill. App. 287, 47 N.E.(2d) 728. From the evidence in this case the question of intoxication was a question of fact for the jury. A court of review cannot hold the jury's verdict to be against the manifest weight of the evidence unless an opposite conclusion is clearly evident. Green vs. Keenan, 10 Ill. App.(2d) 53, 134 N.E.(2d) 115, Griggs vs. Clauson, 6 Ill. App.(2d) 412, 128 N.E.(2d) 363, and Olin Industries, Inc. vs. Wuellner, 1 Ill. App.(2d) 267, 117 N.E.(2d) 565. Such is not the situation in this case.

Defendant complains of instructions numbered 8, 9 and 19 given on behalf of plaintiff. The court gave 19 instructions on behalf of plaintiff and 18 on behalf of defendants. A court of review will not be too critical of instructions where such a large number are tendered and given. Schluraff vs. Shore Line Motor Coach Co., 269 Ill.App. 569. Instruction number 8 set out the substance of the Dram Shop Act.

Conrad Co., 269 Ill.App. 569. Instruction number 5 set out the

number are tendered and given. Conrad v. Ryan Shop

review will not be too critical of instructions where a large
benefit of plaintiff and is on behalf of defendant. A court of
given on behalf of plaintiff. The court gave 19 instructions on
defendant complains of instructions numbered 8, 9 and 19
the situation in this case.

va. Bellamy, 1 Ill. App. (2d) 569, 117 N.E. (2d) 569. This is not

6 Ill. App. (2d) 512, 128 N.E. (2d) 563, and Ill. App. 111.

Kearney, 10 Ill. App. (2d) 53, 134 N.E. (2d) 115, 116 N.E. (2d) 116.

unless an opposite conclusion is clearly evident. Green v.

jury's verdict to be against the manifest weight of the evidence

question of fact for the jury. A court of review cannot hold the

from the evidence in this case the question of information was a

36 N.E. (2d) 603, and ex v. Haggerty, 317 App. 327, 47 N.E. (2d) 737.

Ill. App. 111. 570, 111 N.E. 457, 111 N.E. 457.

letty lawson to give their opinion as to hood's intoxication.

The trial court did not err in permitting plaintiff and the witness

intoxicated. Jordan v. Bellamy, 281 Ill. App. 457, 111 N.E. 457.

and that conduct of himself that he otherwise would have, he is

be excited from it and not to possess that clearness of intellect

if he is under the influence so as not to be at himself, so as to

or visible signs to the casual observer that he is drunk, yet

Our attention is called to the fact that plaintiff's instructions were taken from the Chicago Bar Association Standardized Instructions work. While this, in and of itself, does not establish the propriety of the instructions, we are not unmindful of the fact that much time and effort by leading practitioners was put into the preparation of this work.

Instruction number 8 is as follows:

"The law provides, in substance, that every person who shall be injured in person by any intoxicated person shall have a right of action against any person or persons who shall, by selling or giving, alcoholic liquor, have caused the intoxication in whole or in part, of such intoxicated person".

This instruction sets out the substance of the Dram Shop Act as it applies to this particular case. It is designed to eliminate those provisions which have no bearing on the case and any reference to the amount of recovery, which have formed the basis of criticism by the courts where the statute is set out verbatim.

Instruction number 9 is as follows:

"The plaintiff may recover from the defendant, Elsie Whitehead, if she proves as against that defendant, by the greater weight of the evidence, and under the instructions of the Court, each and both of the following elements:

First: That she was injured in person by an intoxicated person .

Second: That the intoxication of such intoxicated person was caused, in whole or in part, by alcoholic liquors sold or given to him by that defendant".

Our attention is called to the fact that defendant's instructions were taken from the Chicago Bar Association. Defendant's work. While this, in and of itself, does not establish the propriety of the instructions, we are not unaware of the fact that each time and effort by leading practitioners was the basis of the preparation of this work.

Instruction number 8 is as follows:

"The law provides, in substance, that every person who shall be injured in person or property by any intoxicated person shall have a right of action against any person or persons who, by selling or giving, alcoholic liquor, have caused the intoxication in whole or in part, of such intoxicated person."

This instruction sets out the substance of the law that it is applied to this particular case. It is applied to all cases where provisions which have no bearing on the case and any reference to the amount of recovery, which have formed the basis of defendant's case, where the statute is set out verbatim.

Instruction number 9 is as follows:

"The plaintiff may recover from the defendant, if she proves as against defendant, by the greater weight of the evidence, and under the instructions of the court, each and both of the following elements:

- First: That she was injured in person or property by an intoxicated person.
- Second: That the intoxication of such intoxicated person was caused, in whole or in part, by the sale or giving of alcoholic liquor to him by the defendant."

These same elements are contained in defendant's peremptory instruction 22 which, although erroneous in injecting the proximate cause element in this case, is framed from defendant's viewpoint and is as follows:

"In order to find the issues for the plaintiff, Avis DeLong, and against the defendant, Elsie Whitehead, the plaintiff must prove, by a preponderance of the evidence.

First, that the defendant, Elsie Whitehead, herself, or by her employees or agents, gave, or sold, intoxicating liquor to Elvy Rook;

Second, that Elvy Rook was intoxicated;

Third, that liquor obtained from Elsie Whitehead, her employees, or her agents, caused in whole, or in part, the intoxication of Elvy Rook;

Fourth, that the plaintiff, Avis DeLong, has been injured and damaged, and that the intoxication of Elvy Rook was the proximate cause of the injury;

And, unless you so find, by a preponderance of the evidence, you should find the issues against the plaintiff, Avis DeLong, and for the defendant, Elsie Whitehead."

We fail to see any basis for criticism of this instruction.

Plaintiff's instruction 19 is as follows:

"In this case a statement was read in evidence as to what Tom Hanners would have testified to if present. You are instructed that although the Plaintiff stipulated that said witness would so testify, this does not mean the matters stated in said statement are necessarily true. The jury may judge the truth or falsity of the statement of what Tom Hanners would testify to the same as any other evidence in the case".

These same elements are contained in defendant's competency instruction 22 which, although erroneous in inferring the proximate cause element in this case, is framed from defendant's viewpoint and is as follows:

"In order to find the issues for the Plaintiff, Avisa Belmont, and against the defendant, Elsie Whitehead, the Plaintiff must prove, by a preponderance of the evidence,

First, that the defendant, Elsie Whitehead, herself, or by her employees or agents, gave, or sold, information known to Elsie Whitehead;

Second, that Elsie Whitehead was influenced;

Third, that liquor obtained from Elsie Whitehead, her employees, or her agents, caused in whole, or in part, the intoxication of Elsie Whitehead;

Fourth, that the Plaintiff, Avisa Belmont, has been injured and damaged, and that the intoxication of Elsie Whitehead was the proximate cause of the injury;

And, unless you so find, by a preponderance of the evidence, you should find the issues against the Plaintiff, Avisa Belmont, and for the defendant, Elsie Whitehead."

It is to be noted that this instruction fails to set any basis for criticism of this instruction.

Plaintiff's instruction 19 is as follows:

"In this case a statement was read in evidence as to what Tom Hanners would have testified to if present. You are instructed that although the Plaintiff stipulated that said witness would so testify, this does not mean the matters stated in said statement are necessarily true. The jury may judge the truth or falsity of the statement of what Tom Hanners would testify to the same as any other evidence in the case."

The complaint leveled at this instruction is that it tends to cast suspicion on the stipulated testimony of the absent witness. If there be any basis for this complaint we think it was cured by defendant's instruction 34 as follows:

"It is your duty under the law to consider all of the facts which plaintiff has admitted that Thomas F. Hanners would testify to if present as a witness and to give to all such facts the same weight in making up your verdict as if the said Thomas F. Hanners had been present in person and testified orally before you."

and that the jury could not have been misled. Instructions are taken as a connected series and the jury cannot single out one instruction and disregard others, but must take all the instructions together as the law. When so viewed we think the jury was properly instructed in this case.

Defendant's refused instruction 39 is as follows:

"The Court instructs you in reference to the credibility of witnesses that if you find that any witness has knowingly or willfully testified falsely to any fact or state of facts you are warranted in entirely disregarding his or her testimony, except in so far as he or she are corroborated by other facts or circumstances established by credible testimony."

The propriety of this type of instruction has been the subject of pro and con discussion in many cases. In McManaman vs. Johns-Manville Products Corp., 400 Ill. 423, 81 N.E.(2d) 137, the court said that it "considered this type of instruction to be highly unsatisfactory". The vice of the instruction, however, as drawn, is

The complaint leveled at this testimony is that it tends to cast suspicion on the attested testimony of the absent witness.

If there be any basis for this complaint we think it was cured

by defendant's instruction 34 as follows:

"It is your duty under the law to consider all of the facts which plaintiff has submitted that Thomas W. Hanners would testify to if present as a witness and to give to all such facts the same weight in reaching your verdict as if the said Thomas W. Hanners had been present in person and testified orally before you."

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taken as a connected series and the jury cannot sin in its

instruction and disregard others, but must take all the instructions

together as the law. When so viewed we think the jury was properly

instructed in this case.

Defendant's refusal instruction 33 is as follows:

"The Court instructs you in reference to the credibility of witnesses that if you find that any witness has knowingly or willfully testified falsely to any fact or state of facts you are warranted in entirely disregarding his or her testimony, except in so far as it is corroborated by other facts or circumstances established by credible testimony."

The propriety of this type of instruction has been the subject of

pro and con discussion in many cases. In Johnson v. Johnson-Mansville

Products Corp., 400 Ill. 453, 81 N.E. (2d) 137, the court said

that it "considered this type of instruction to be right, proper-

factory". The view of the instruction, however, as stated, is

that it is too broad. The false testimony as to "any fact or state of facts" is not qualified as being "material to the issues".

Eautert vs. Carlson, 116 Ill. App. 260. There was no error in refusing the instruction as drawn.

The trial court submitted five forms of verdict as follows:

- (1) Finding both defendants guilty and assessing plaintiff's damages.
- (2) Finding both defendants not guilty.
- (3) Finding only defendant Elsie Whitehead guilty and assessing plaintiff's damages.
- (4) Finding only defendant Rook guilty and assessing plaintiff's damages.
- (5) Finding one only of the defendants not guilty naming that defendant.

It is true that the complaint contains two counts, one against Rook and the other against Whitehead. Defendant's contention that there should have been separate verdicts as against each defendant overlooks the fact that plaintiff's injury was a single, indivisible one and the damages she sustained were inseparable. The tortious act of each defendant may properly be regarded as having concurred in this single indivisible injury and their tort liability may be regarded as arising out of the same circumstances. Plaintiff had the election to so treat the case despite the fact that separate

that it is too broad. The false testimony as to fact or state of fact is not qualified as being "material to the issues".
Langert v. Garson, 116 Ill. App. 2d. There was no error in refusing the instruction as given.

The trial court submitted five forms of verdict as follows:

(1) Finding both defendants guilty and assessing Plaintiff's damages.

(2) Finding both defendants not guilty.

(3) Finding only defendant First Defendant guilty and assessing Plaintiff's damages.

(4) Finding only defendant Second Defendant guilty and assessing Plaintiff's damages.

(5) Finding one only of the defendants not guilty naming that defendant.

It is true that the complaint contains two counts, one against each defendant and the other against Plaintiff. Defendant's contention that there should have been separate verdicts as against each defendant overlooks the fact that Plaintiff's injury was a single, indivisible one and the damages are certain and fixed. The portion of each defendant's injury properly be regarded as having occurred in this single indivisible injury and each defendant's liability may be ascertained by trial out of the same circumstances. Plaintiff had the election to so treat the case despite the fact that separate

counts were used in the complaint. Curtis vs. Gedman, 338 Ill.
App. 463, 87 N.E.(2d) 865.

The judgment of the trial court is accordingly affirmed.

Affirmed.

Mr. Justice Hibbs took no part in this opinion.

counts were used in the complaint. United States v. Smith, 332 F.2d 111.

332 F.2d 403, 17 A.L.J. (2d) 105.

The judgment of the trial court is accordingly affirmed.

Reversed.

Justice Brandeis took no part in this opinion.

Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

NAY TERM, A. D. 1956

General No. 10050

Agenda No. 7

Avis DeLong.

Plaintiff-Appellee.

v2.

Elsie Whitehead and Elvy Rook.

Defendants.

15

Elsie Whitehead.

Defendant-Appellant.

Appeal from

Circuit Court of

Greene County

SUPPLEMENTAL OPINION

Roeth, J.

Defendant in petition for rehearing contends that as a matter of law plaintiff was an active and willing agent in procuring Rook's intoxication.

Plaintiff was not with Rook during the afternoon while he was drinking in defendant's tavern nor did she have any knowledge of this fact. Plaintiff arrived at the home of Betty Lawson some time after Rook. She was there between twenty and thirty minutes.

Abstract

STATE OF ILLINOIS

THIRD DISTRICT

APPELLATE COURT

MAY TERM, A. D. 1955

Agenda No. 7

General No. 10050

| | | |
|------------------|------------------------------|----------------------|
| Appeal from | Plaintiff-Appellee, | Avia Nelson, |
| Circuit Court of | vs. | |
| Greene County | Male Whitcomb and Elvy Hook, | |
| | Defendants. | |
| | | Male Whitcomb, |
| | | Defendant-Appellant. |

SUPPLEMENTAL OPINION

March, 1.

Defendant in petition for rehearing contends that as a matter of law plaintiff was an active and willing agent in procuring Hook's intoxication.

Plaintiff was not with Hook during the afternoon while he was drinking in defendant's tavern nor did she have any knowledge of this fact. Plaintiff arrived at the home of Betty Lawson some time after Hook. She was there between twenty and thirty minutes.

While she was there she saw Book have a mixed whiskey drink. There is some conflict in the evidence as to whether plaintiff herself had a mixed whiskey drink at that time. Both she and Betty Lawson testified that she only drank a glass of 7-Up. Book and Hanners testified that she had one highball. Book and plaintiff subsequently left Betty Lawson's home and the accident happened soon after they left.

In support of the contention that as a matter of law plaintiff was an active and willing agent in procuring Book's intoxication the defendant cites James v. Wicker, 309 Ill. App. 397, 33 N. E. (2d) 169; Regat v. Bell, 77 Ill. 593; Forsberg v. Around Town Club, Inc., 316 Ill. App. 661, 45 N. E. (2d) 513; and Bennett v. Auditorium Bldg. Corp., 299 Ill. App. 139, 19 N. E. (2d) 626. In the Regat v. Bell case, supra, it was held that a wife who had the opportunity of depriving the husband of the liquor by either breaking the jug or throwing out its contents and who does not do so is a willing party to his conduct and can not recover. In James v. Wicker two couples engaged in a drinking orgy during an entire evening. Admittedly the defendant was intoxicated and the plaintiff in describing her conduct admitted that she was "a little bit lit". In Forsberg v. Around Town Club, Inc., supra, plaintiff joined three men who had been drinking and thereafter bought a round of drinks for the four. Plaintiff himself was intoxicated. In addition in this case the court noted that the plaintiff

While she was there she saw Book have a drink which she said there was some conflict in the evidence as to whether Plaintiff herself had a drink with Book at that time. Both she and Betty Lawson testified that she only drank a glass of 7-Up. Book and Lawson testified that she had one highball. Book and Plaintiff subsequently left Betty Lawson's home and the accident happened soon after they

In support of the contention that as a matter of law
plaintiff was an active and willing agent in procuring
misconduct the defendant cites James v. [redacted], 109 Ill. App. 197.
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James v. [redacted], 109 Ill. App. 197.
James v. [redacted], 109 Ill. App. 197.
In the James v. [redacted] case, supra, it was held that a wife
who had the opportunity of informing the husband of the liquor by
either breaking the jar or throwing out the contents and who does
not do so is a willing party to his conduct and can not recover.
In James v. [redacted] two couples engaged in a drinking party during
an entire evening. Plaintiff the defendant was intoxicated and
the plaintiff in describing her conduct admitted that she was
"a bit bit". In James v. [redacted], supra,
plaintiff joined three men who had been drinking and plaintiff
bought a round of drinks for the four. Plaintiff himself was intoxicated. In addition in this case the court noted that the plaintiff

had the opportunity to withdraw from the company of ^{the} three men who later assaulted him upon becoming aware of their condition. In Bennett v. Auditorium Bldg. Corp. plaintiff herself brought about her own intoxication. Other cases involving similar situations are Pearson v. Renfro, 320 Ill. App. 202, 50 N. E. (2d) 598; Douglas v. Athens Market Corporation, 320 Ill. App. 40, 49 N. E. (2d) 834; Kreps v. D'Agostine, 329 Ill. App. 190, 67 N. E. (2d) 416; Adkins v. Williams, 330 Ill. App. 427, 71 N. E. (2d) 210; Krotzer v. Drinka, 344 Ill. App. 256, 100 N. E. (2d) 518; Hill v. Alexander, 321 Ill. App. 406, 53 N. E. (2d) 307. From an examination of these cases it appears that the courts of this state have established the rule that where one is an active and willing agent in procuring the intoxication of another he or she is not an innocent suitor under the Dram Shop Act. We have examined all of these cases and we are of the opinion that the facts in the case at bar are in no way comparable to the facts in the cases which have applied the above rule. This court in Lester v. Buoni, 316 Ill. App. 19, 44 N. E. (2d) 68, had before it a factual situation wherein plaintiff and defendant drank one bottle of beer together. Thereafter plaintiff contributed to the purchase of a bottle of wine which the defendant and a third party drank. The defendant continued drinking during the course of the afternoon and evening. Plaintiff made repeated requests of the defendant to be taken home. He finally withdrew from plaintiff's

company and went to sleep in the defendant's car where he was when injured. We there held that the purchase of the wine and subsequent actions of the plaintiff were such as to leave the question of contributory negligence and provocative conduct on the part of the plaintiff as a question of fact for the jury. We are of the opinion that this is the rule that is to be followed in the case at bar. From an examination of the instructions tendered and given on behalf of the defendant it appears that this is the theory upon which this case was tried.

...and went to sleep in the defendant's car where he was
injured. He there told the purpose of the wine and subsequent
actions of the plaintiff were such as to leave the question of
contributory negligence and provocative conduct on the part of the
plaintiff as a question of fact for the jury. He was of the opinion
that this is the rule that is to be followed in the case at bar.
There are numerous of the instructions tendered and given on behalf
of the defendant it appears that this is the theory upon which this
case was tried.

Exhibit of ...

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Abstract

Gen. No. 10929

Agenda 16

FILED

SEP 11 1956

JULIUS R. RICHARDSON
CLERK, PROTEMPORE
Appellate Court Second District

In The
APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1956

11 I.A. ²¹ 331

C. M. WOODS,

Plaintiff-Appellee,

vs.

HARRIS HOME BUILDERS CO., an
Illinois Corporation,

Defendant-Appellant.

}
Appeal from the
Circuit Court of
DuPage County.
}

EOVALDI, J.

Plaintiff brought this action to recover money allegedly due him under a written contract with defendant, Harris Home Builders Co., for the construction of roads in Harris Lombard Hills Subdivision. Count I of plaintiff's ultimate pleading, the second amended complaint, set forth the cause of action on the written contract. In count II plaintiff alleged a conspiracy to defraud, involving the Harris Home Builders Co., and certain other parties.

The case was tried without a jury. The court found the defendant, Harris Home Builders Co., liable under count I of the second amended complaint and assessed damages for the balance due under the written contract in the amount of \$3154.00, with interest in the amount of \$630.80, making a total judgment of \$3748.80. It found the other defendants not liable.

Q. 10. 11. 12. 13. 14.

1991 17

JULIUS R. RICHARDSON
CLERK, PROBATE
Appellate Court Second District

The defendant, Harris Home Builders Co., has filed this appeal. Its theory is that the plaintiff is not entitled to recover, and that the judgment should be reversed, in that plaintiff pleaded performance of all the obligations imposed upon him by virtue of the written contract, but did not prove such performance; and, the plaintiff failed to plead and prove an excuse for not performing all his contractual obligations.

The plaintiff's theory is that he substantially performed his contract; and that thereafter, the roads constructed by him were damaged (1) by the defendant's construction activities, including the installation of an underground water system, and (2) by failure of the subdivision drainage system installed by the defendant.

On September 9, 1950, the plaintiff entered into a written contract with the defendant, Harris Home Builders Co., a corporation, under which the plaintiff was to construct approximately a mile of roads for the defendant in a subdivision located at North Avenue and Main Street outside the Lombard Village limits. The contract provided that the construction of the roads should conform to or surpass the requirements set forth in certain specified regulations adopted by the DuPage County Board of Supervisors concerning the building of roads which were to be accepted by the Township and the County for maintenance after their completion. The contract further stated that the plaintiff was to obtain approval of said roads when completed by the Highway authorities of York Township and DuPage County. Payment of seventy-five per cent of the agreed price of \$2.00 per lineal foot for full roads and of \$1.50 per foot for

The following, which was written by the same hand,

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half roads was to be made when all or any "intrical" portion of the work was completed. The remaining twenty-five per cent was to be paid by defendant to plaintiff when the work was approved and accepted by the Highway authorities of York Township and of DuPage County.

Immediately after the contract was signed by the parties, the plaintiff graded, stoned and graveled the roads and completed the ditches and slopes. In November of 1950, Alfred F. Beckman, the Highway Commissioner of York Township, inspected the roads at the request of the plaintiff. At that time the president of the defendant corporation, William F. Harris, protested that there was not a full eight inches of gravel on the roads in some spots as required by the contract and by the specifications of the County Highway department. Alfred F. Beckman testified at the trial that at that time "we were willing to accept the roads" contingent to the stone deficiency being corrected. He further testified that in 1951 the plaintiff had corrected the gravel deficiency to the satisfaction of the defendant's engineer. In the fall of 1951, Beckman wrote a letter to all parties concerned in reference to the acceptance of the roads, which letter was introduced into evidence. It stated that the roads were graded and graveled as early as November, 1950, and that there was little left to be done by the plaintiff at that time, and that the gravel deficiency was completed by plaintiff early in 1951, and that subsequently defendant disrupted the roads by his construction activities so that the roads could not be accepted. It further stated that all that was required was to restore the roads as originally left by the plaintiff.

The evidence discloses that after the work on the roads

was done by the plaintiff in the fall of 1950, the defendant, or his sub-contractors, dug trenches for water mains across the roads in a number of spots while the defendant was in the process of constructing 25 to 30 homes in the subdivision; that a large crane and other heavy equipment was moved in and moved down the ditch lines; that the roads were used by trucks to haul materials for these homes, and various materials were dumped on the roads. The trenches dug across the road were filled with dirt, and settled as much as two feet after a rain. The lateral trenches across the roads and the damage done by the heavy construction equipment, together with the failure of a drainage system installed by the defendant, caused water to collect on the roads causing considerable damage to them.

After the plaintiff added the additional gravel to the roads as directed by Mr. Beckman, the defendant, in May of 1951, paid seventy-five per cent of the contract price, which amounted to \$9462.50. The plaintiff in the meantime had performed some additional work on the roads in attempting to repair the damage done to them and sought to recover \$1261.65 additional compensation for same, but this was not allowed by the trial court.

The remaining twenty-five per cent of the contract price which was not paid to the plaintiff was subsequently paid to John Kennedy, doing business as Roselle Trucking and Excavating Company, who did the additional work necessary to place the roads in an acceptable condition. Kennedy testified that eighty per cent of his work was performed on the parkways and the areas between the shoulder of the road and the property lines; that when he started work, water was standing on the subdivision and on the roads; that the drain tile installed by the defendant had never worked, and that it was necessary for him to lower a

catch basin that was not operating and to raise the grade of one of the roads some eight inches in order to provide adequate drainage.

The second amended complaint pleaded performance by the plaintiff of all conditions precedent to his right of recovery, including the approval of the roads by the appropriate authorities. It is contended by defendant that the plaintiff failed to prove such performance at the trial but instead attempted to show that he, plaintiff, was prevented from gaining acceptance of his work by the conduct of the defendant. The defendant stresses the fact that the plaintiff did not plead in count I of the second amended complaint an excuse for his nonperformance of the contract.

No remarks of the trial court appear in the abstract in this cause. It would be presumptuous on our part to hold, as argued by appellant, that the trial court based its decision on an excuse proven by the plaintiff for nonperformance, rather than upon a substantial performance by the plaintiff of the terms of the contract. In *Erikson v. Ward*, 266 Ill. 259, a suit involving a contract requiring that a building be constructed in accordance with certain plans and specifications, in affirming the judgment for the contractor, the court stated, page 263:

"This court has adopted the rule sustained by the weight though not by all of the authorities, that where there has been no willful departure from a building contract in essential points but the contractor has honestly performed the contract in all its substantial and material particulars, he will not be held to have forfeited his right to recover by reason of technical, inadvertent or unimportant omissions."

On appeal the finding of the trial court in a proceeding at law will be affirmed unless wholly unsupported by the evidence. In *Rodenkirk v. State Farm Mutual Auto. Ins. Co.*, 325 Ill. App.

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421, the court said, at page 441:

"As the evidence is conflicting in respect thereto, we feel that the finding of the court, who was in a much better position than we are to weigh the evidence, should not be disturbed. The findings of a trial court will be sustained unless wholly unsupported by the evidence. (Winnetka Park Dist. v. Hopkins, 371 Ill. 46; Marine Trust Co. of Buffalo v. Reynolds, 308 Ill. App. 595.)"

In Marine Trust Co. v. Reynolds, 308 Ill. App. 595, the court said, at page 605:

"There is a presumption on appeal in favor of the finding of fact made by a trial court. Cohen v. Schimberg, 165 Ill. App. 170. In the absence of a finding of fact by a jury, the court's finding of fact is equivalent thereto. Fifth Ave. Library Society v. Cavanaugh, 186 Ill. App. 123; Sumner v. Elgin Condensed Milk Co., 87 Ill. App. 217. The findings of the court will be sustained unless they are wholly unsupported by the evidence. Town of Bois D'Arc v. Convery, 255 Ill. 511."

The record fails to disclose any meritorious ground for reversing the judgment, and it is affirmed.

Judgment affirmed.

Dove, F. J. Concurs

Crow, J. Concurs

ALL, THE COURT, 10 JUNE 1911

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Abstract

Gen. No. 10924

Agenda No. 3

FILED

SEP 13 1956

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JULIUS R. RICHARDSON

CLERK, PROTEMPORE

Appellate Court Second District

MAY TERM, A. D. 1956.

ETTY HOGSETT,
Plaintiff,

vs.

WILBUR HOGSETT,
Defendant,
VELMA HOYLE,
Respondent.

VELMA HOYLE,
Appellant,

vs.

WILBUR HOGSETT,
Appellee.

111 A. 332^{2d}

Appeal from the

Circuit Court of

Lake County.

CROW, J.

This is an appeal from an order of the Circuit Court of Lake County, changing the custody of two minor children from the maternal grandmother to the appellee, the father of the children herein.

The pertinent facts in this case disclose that on October 23, 1954, Wilbur W. Hogsett, father of two minor children, age 7 and 9 years respectively, filed a verified petition alleging that he was divorced by Etty Hogsett in the Circuit Court of Lake County on the grounds of cruelty and that Etty Hogsett was awarded the custody of the two children subject

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to the rights of reasonable visitation by him; that the children had reached school age and that the petitioner maintained a proper home within the jurisdiction of the Court in which the children could live; that on September 30, 1949, he filed a petition to change the custody of the children from their mother, Betty Hogsett, to their maternal grandmother, Velma Hoyle, for the reason that Betty Hogsett had married one Glen Boardman whom the petitioner believed was suffering from psychoneurosis and the petitioner felt that it was to the best interest of the children that the custody of said children be transferred to their maternal grandmother, Velma Hoyle; that he did not have at the time an adequate home in which to keep the children and himself; that on October 28, 1949, the prayer of the aforesaid petitioner was granted and the court ordered the custody of the children transferred to their maternal grandmother, Velma Hoyle; that since the entry of the divorce decree, the petitioner has remarried and now lives and maintains a proper home in Winthrop Harbor, Illinois, in which the aforesaid two children could live comfortably, well, and adequately, and that the petitioner's present wife would welcome the two children to live with her and petitioner; that the petitioner and his wife are fit and proper persons to have the custody of petitioner's two children from his prior marriage; and that petitioner has one small daughter, age 3 years, born of the present marriage.

Thereafter, Velma Hoyle filed her answer to the petition denying the fitness of the father to have the custody of the children and praying that the petition be denied and that the custody of the two children remain with her as heretofore

to the minds of prominent physicians by him; that the bill-
board and second school was not the petition submitted
a report from which the Commission of the House in 1890
children would live; that on September 30, 1890, he filed a
petition in which the subject of the children from their
mother, being in fact, he had, several physicians, John
Boyle, for the reason that Boyle himself had married and then
married with the children from his wife, Boyle.
psychiatrists and the petitioners felt that it was in the best
interest of the children that the custody of said children be
given to their mother, Boyle, and that Boyle, John, Boyle, and
he did not have at the time of signature of the bill to have
the children and himself; that on October 10, 1890, the mother
of the children petitioned and stated and the court ordered
the custody of the children transferred to their mother, Boyle.
mother, John Boyle, and also the custody of the children be-
cause, the petitioners had married and the lives and welfare
a proper home in Chicago, Illinois, in which the mother
said two children could live comfortably, well, and adequately,
and that the petitioners' mother and wife would leave the two
children to live with her and petitioners; that the petitioners
and his wife are fit and proper persons to have the custody of
petitioners' two children from his mother, Boyle, and that pe-
titioner has one small daughter, age 3 years, born at the

present marriage.

Thereafter, John Boyle filed an answer to the peti-
tion denying the fitness of the father to have the custody of
the children and saying that the petition be denied and that
the custody of the two children remain with her as mother.

ordered by the Court in 1949. The order entered herein after the decree which granted the divorce, directed Wilbur Hogsett to pay to Velma Hoyle \$50.00 per month for the support of said minor children, subject, however, to the right and privilege of the petitioner to have the custody of said minor children every other Sunday, until further order of the Court.

It appears from the evidence that subsequent to the entry of the divorce decree between Wilbur Hogsett and his ex-wife, Betty Hogsett, the said Wilbur Hogsett suffered a nervous breakdown, which left him with a speech defect, and subsequent to his recovery from the breakdown, he suffered third degree burns to his body. The evidence further showed that Wilbur Hogsett had been in arrears in the payment of support money to Velma Hoyle; that Velma Hoyle had filed a petition in Court against Wilbur Hogsett to show cause why he shouldn't be held for contempt of court since he wilfully refused to obey the order of the Court entered October 26, 1949, and that he was in arrears in support payments in the amount of \$1360.00. In response to this petition the court entered no order of contempt on the motion of Velma Hoyle, but did enter, on July 22, 1955, a judgment order against Wilbur Hogsett in the sum of \$1055.00 for the arrearages claimed by her. The mother of the children in question never filed an answer to Wilbur Hogsett's petition to modify the decree with respect to the custody of the children, which had been placed in Velma Hoyle.

It is the respondent-appellant's theory in this case that there was no showing that the welfare of the children required a change of custody. The position of Wilbur Hogsett, defendant-appellee, is that the welfare and interest of the

order of the Court in 1944. The order ordered that the
for the defense which was the defense, directed that
to be to pay to the State \$100,000 for the cost
of the trial, which, however, to the right
and interests of the defendant to have the benefit of the
which defendant was to pay, well known order of the
Court.

It appears from the evidence that defendant is the
owner of the property which was the property of the
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children is best served in the custody of their father and not in the grandmother as between a father and grandmother; that the father in this case is a fit person to have the custody of his children; further, that a father as against all third persons has an inherent and legal right to his children unless he has forfeited his right to the custody or where the welfare of the child demands that the parent should be deprived of the custody.

We do not believe it necessary to set out in detail the evidence. There is no evidence to support the contention that the father Wilbur Hogsett is not a fit person to have custody. This is not a case where the mother is contending by reason of the divorce that she has a right to the custody. Ordinarily, the father of a child has the right to the custody against the world unless he has forfeited that right or it has been adjudged that he is not a fit person to have custody, or the welfare of the child demands that he be deprived of it. STAFFORD vs. STAFFORD (1921) 299 Ill. 438. The trial court recognized the fitness of the father to have custody of the children by decreeing that he should have them part of the time.

We come to the question whether the father has forfeited his rights to custody of the children. It is a fact that a divorce was granted Betty Hogsett against the petitioner on the grounds of extreme and repeated cruelty. At that time the mother was given custody of the children and it was only on Wilbur Hogsett's petition that the custody was changed from the mother to the maternal grandmother. This was an arrangement apparently temporarily due to some illness in the family of Betty Hogsett. We believe these acts of Wilbur

Hogsett, the petitioner and father, did not create a forfeiture. We are inclined to believe that the trial court correctly determined that question in its memorandum opinion filed in this cause. We quote:

" * * * * * I don't think the father in this case can be said to have forfeited or given up completely the custody of these children on the basis that he was willing in 1949 to have the children placed in the custody of the maternal grandmother in preference to remaining in the custody of the mother, and I assume the circumstances that existed at that time in his mind at least led him to believe that the children would be better off with the maternal grandmother than for them to remain with the mother. At that time the record shows a petition asking for that change was filed by the father, and that the mother of the children consented to it, so I am simply presented with a situation where both parties at that time agreed that the custody of the children be placed as of that time with the maternal grandmother. * * * * * I cannot say that because of the situation in 1949, when he thought that the grandmother was the proper person to take care of them, that the father has in effect forfeited his parental rights, * * * * * ."

Further, we are of the opinion that the order of modification wherein the custody of the two minor children was transferred to the grandmother, Velma Hoyle, was in the nature of a consent order. A consent decree does not purport to represent the judgment of the Court, but merely records the agreement of the parties. A consent decree is not a judicial determination of the rights of the parties. BENSON v. BENSON (1929) 354 Ill. 137.

The appellee cites KULAN v. ANN MCGOWAN (1939) 300 Ill. App. 267, which reviews the leading Illinois cases having to do with the custody and the rights of a parent to the custody of

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1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

the children against all the world. One of the leading cases referred to therein is CORNBACH v. HARRIS (1904) 211 Ill. 519, and the Supreme Court made the following comment in that case:

" * * * * * We regard the rights of the parent as superior to those of any other person, when that parent is a fit person to have the custody of children and is so circumstanced that he can provide the necessities of life and administer to the requirements of such a charge. * * * * *

In the case of KELLEY v. ANDERSON, supra, the Court said:

"In our opinion, the father, under the law of this State and the admitted facts, had the right to the sole custody of the child, and the action of the trial court in ordering that the aunt have the custody of the child for a certain period of time on alternate week-ends was a material abridgment of that right. The rule that a parent has the right to the custody of his child against all the world, unless he has forfeited that right, was born of the natural desire of mankind to create and maintain a home; and, as has been often said, the home is the foundation of society and civilization. Deprive worthy parents of their natural right to the custody of their children, where they have not forfeited that right, and you undermine the home."

The order of the trial court entered August 8, 1955, in addition to giving custody of the two minor children to the father, the petitioner, Wilbur Hogeatt, provided that the grandmother, Velma Hoyle and respondent herein, have the children on alternate week-ends and for seven weeks during the summer vacation, exclusive of the three-week vacation period of the father.

We believe that this trial court after seeing and hearing all of the evidence was justified in transferring the custody of the two children in question to their father, Wilbur Hogaett. The order of the trial court is affirmed.

ORDER AFFIRMED.

Howe P.J. Concur

But unless this is done, the result will be
that the Government will be forced to
pay the cost of the children in their
education. The Government is not
willing to do this.

How 9.9.19

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court)
Second District) ss:

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11 I.A. 333

At a term of the Appellate Court, begun and held at
Ottawa, on Tuesday, the first day of May, in the year of
our Lord one thousand nine hundred and fifty-six, within
and for the Second District of Illinois:

Present -- Honorable FRANKLIN R. DOVE, Presiding Justice

Honorable DEWITT S. CROW, Justice

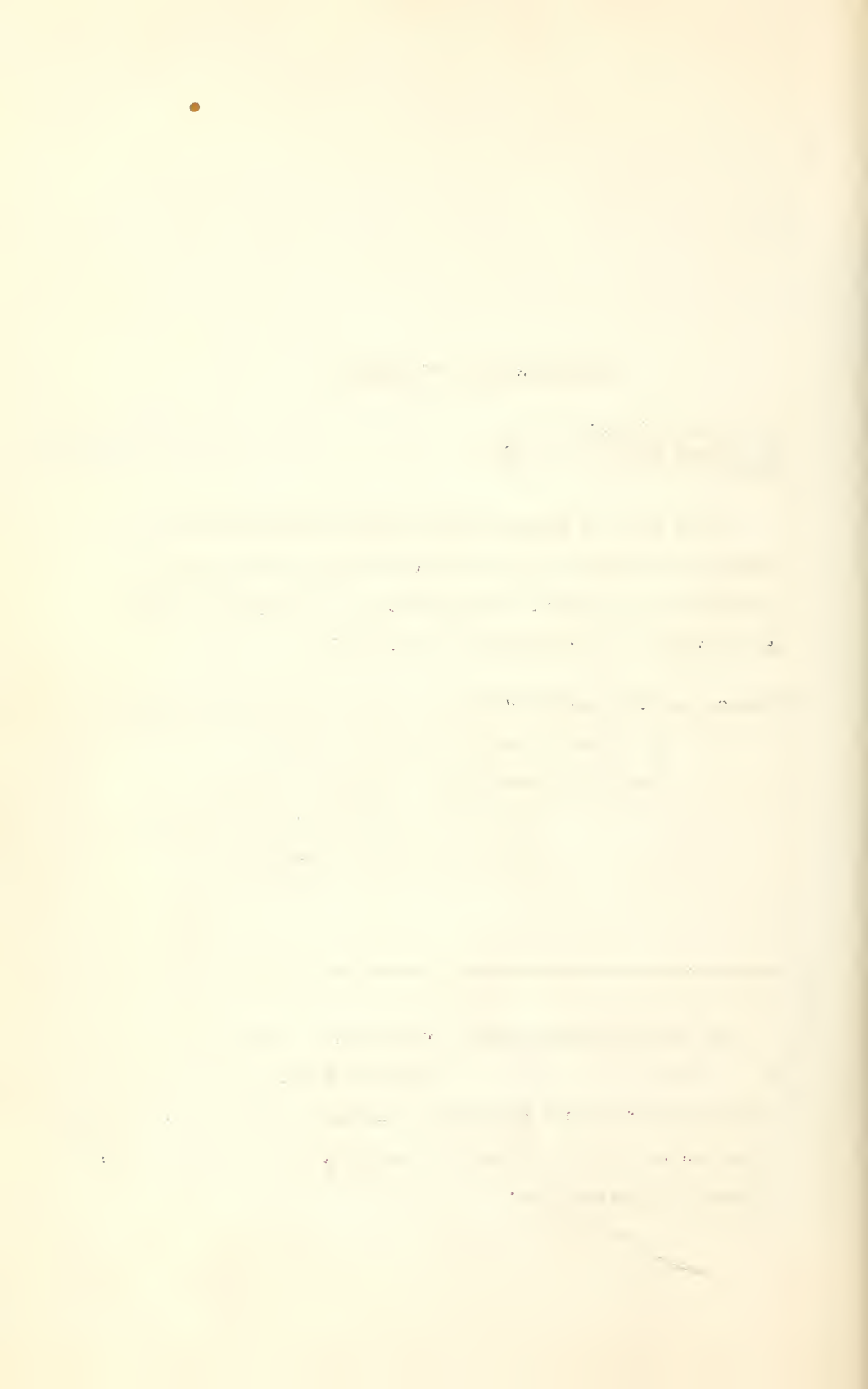
Honorable BENEDICT W. EOVALDI, Justice

JULIUS R. RICHARDSON, Clerk Pro Tempore

EDWARD R. LAMBERT, Sheriff

BE IT REMEMBERED, that afterwards, to-wit:

On September 20, 1956 the same being one of the days
of the term of Court aforesaid, the Opinion of the Court was
filed in the Clerk's Office of said Court, in the words and
figures following, viz:



that the writ was not susceptible of division and that
there was no prejudice to the parties.

On September 9, 1955, *Franc Lallie* vs. *State of Louisiana*, No. 141,
during the term of April 12, 1955, when action was required
by the affidavit. The action, under other things, alleged, in
substance, that there were errors or law apparent on the face of
the record, which were so fundamental as to require a decree, and
that there were errors of fact in the Decree which is known to
the Court at the time of entry thereof would have prevented the
entry thereof. The Court, on September 9, 1955, after a hearing,
granted the motion, set aside the Decree of Partition etc. of
April 12, 1955, and the Decree of Sale of June 17, 1955, and
ordered the defendants to plead. A later motion of the plaintiff
to vacate the order of September 9, 1955 was denied, and the
writ is taken from those orders.

It is the appellants' theory that the Court, on September
9, 1955, lacked jurisdiction to vacate the Decrees of April 12,
1955 and June 17, 1955, more than thirty days after the date of
their entry, because no fraud, accident, or mistake occurred in
their entry. The appellants say the Court had jurisdiction to do
so because first, there was no action or process on or pending
over the person of a necessary party defendant, the De-
fendant *Franc Lallie*, as Administrator of the Estate of *Anna
Lallie*, deceased, and the Court necessarily had jurisdiction,
either on its own motion or on the motion of any party, to set
a decree aside at any time, where it did not have jurisdiction
over the person of one of the necessary parties; and, secondly,
the complaint did not allege facts sufficient to justify the
setting aside of the decree from the plaintiffs to *Franc Lallie*.

We think that *Franc Lallie*, as Administrator of the

generally had no jurisdiction of the person of the defendant, and, finally, in the terms of April 18, 1945 that the defendant's two arrests were supported by law, in conformity with the law of the United States and no jurisdiction in either the district or circuit of April 18, 1945 and June 10, 1945 so far as that defendant is concerned; and such were held to be as that defendant is condemned; UNITED STATES v. WEST BOMB TRUST CO., INC., et al. (1941) 377 U.S. 344.

Although ordinarily, of course, a Court has no power to vacate or set aside its final trial judgment or decree at a subsequent term (as under the law prior to the Civil Practice Act, so after the expiration of thirty days from the date of the entry of judgment) -- under the law since the Civil Practice Act, a Court does have power to vacate a judgment or decree even if after the expiration of the term at which it was entered or after the expiration of thirty days from the date of rendition thereof, inter alia, where the Court was without jurisdiction to enter the judgment or decree in the first instance, whether for lack of jurisdiction of the subject matter or the person of the defendant; and such a judgment or decree, under those circumstances, is void and may be set aside or vacated at any time; CITY OF CHICAGO v. NORMAN et al. (1938) 370 U.S. 547; SHAWNEE and ALICE INC., v. BOARD OF COMMISSIONERS et al. (1939) 385 U.S. 438; AMERICAN v. AMERICAN (1937) 366 U.S. 401; UNITED STATES v. WEST BOMB TRUST CO., INC., et al., supra; UNITED STATES v. THURMAN et al. (1938) 369 U.S. 314; CITY OF CHICAGO v. NORMAN et al. (1938) 370 U.S. 547.

It is true, as the Appellate says, that Section 50 (7) of the Civil Practice Act, CH. 110, ILL. REV. STAT., 1935, rev. 1947, provided at the time of its enactment that:

*1. The company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City. The company is engaged in the business of manufacturing and selling various types of machinery and equipment.

And it is also the fact that the company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City.

The company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City. The company is engaged in the business of manufacturing and selling various types of machinery and equipment.

*2. The company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City. The company is engaged in the business of manufacturing and selling various types of machinery and equipment. The company is also engaged in the business of providing technical services and consulting to its customers.

*3. The company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City. The company is engaged in the business of manufacturing and selling various types of machinery and equipment. The company is also engaged in the business of providing technical services and consulting to its customers. The company is also engaged in the business of providing training and education to its employees.

And it is also the fact that the company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City.

The company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City. The company is engaged in the business of manufacturing and selling various types of machinery and equipment. The company is also engaged in the business of providing technical services and consulting to its customers. The company is also engaged in the business of providing training and education to its employees. The company is also engaged in the business of providing maintenance and repair services to its customers.

And it is also the fact that the company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City.

The company is a corporation organized under the laws of the State of New York, and its principal office is located at 100 Broadway, New York City. The company is engaged in the business of manufacturing and selling various types of machinery and equipment. The company is also engaged in the business of providing technical services and consulting to its customers. The company is also engaged in the business of providing training and education to its employees. The company is also engaged in the business of providing maintenance and repair services to its customers. The company is also engaged in the business of providing installation and commissioning services to its customers.

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Agenda No. 26

1992 1993 1994

111. A. 344¹

Appellant, Cecil O. Libbee, filed with the Commissioner of Highways of his township a petition to lay out a road from his dwelling house to a public highway. In his petition, he alleged he was the owner of a described ten-acre tract of land and that said tract was improved with a dwelling house situated on the northwest corner of the premises and that it was isolated from a public road and without any means of ingress or egress. The prayer of his petition was that a road for public and private use of the width of three rods or less be laid out from the above tract to the nearest public road and that such road be laid out over the lands of John Huber and Walter Maacks, located in the South Half of the Section where petitioner's land

is located. The petition further prayed that the general route of the road be from the public road, thence across the west edge of the land owned by Walter Maacks and adjoining, but not upon, the land used by John Huber for ingress and egress to his dwelling house in said section, thence north and east following along the east edge of, but not upon or across, the John Huber land, and thence across the land of Walter Maacks and John Huber until the route touches the North Half of Section 27, and thence east to the land owned by appellant.

The Commissioner of Highways denied the petition and an appeal was taken by appellant to the County Superintendent of Highways, Harold David Imhoff, who also denied the petition. Appellant then filed the instant petition in the Circuit Court of Woodford County praying for a writ of mandamus, directed to appellee, as County Superintendent of Highways, commanding him to lay out the road for which he petitioned. The cause was heard upon a stipulation of facts entered into between appellant and appellee. At the conclusion of the hearing, the circuit court denied the petition and petitioner appealed to the Supreme Court. That court, without opinion, transferred the cause to this court, *as no freehold is involved (Motsinger v Chenoweth, 308 Ill. 31, 34).*

Included in the stipulation of facts entered into between the parties is a plat showing the property in question together with the lands adjoining the same. The plat designates appellant's ten-acre tract as "Tract A" and shows that the land of Walter Maacks is located to the south and west of Tract A. It is designated on the plat as "Tract B." The John Huber land, which is designated

is located. The petition further states that the Federal
route of the road is from the middle road, thence across
the west side of the land owned by Walter Smith and
adjacent, but not used, the land used by John Smith for
timber and across to the dwelling house in said section,
thence north and east to the east side of the road, and thence
but not used on either, the land owned by Walter Smith and
across the land of Walter Smith and John Smith until
the route reaches the north end of section IV, and thence
east to the land owned by defendant.

The Commission of Highways denied the petition

and an appeal was taken in opposition to the denial
and a writ of mandamus, return being made, was also
denied the petition. Upon appeal from the denial
petition in the Circuit Court of Howard County seeking
for a writ of mandamus, directed to compel the County
Commissioners of Highways, commission them to lay out
the road for which he petitioned. The State was made
upon a petition of facts which had been admitted
and decided. At the conclusion of the hearing, the
circuit court denied the petition and petitioner appealed
to the Supreme Court. That court, without opinion, trans-

ferred the case to this court for decision. *208 Md. 313 (1914)*
Included in the petition of facts were the following

between the parties is a lot within the County of
Howard together with the land adjoining the same. The
lot designated Applicant's two-acre tract is shown in
and shows that the land of Walter Smith is located to
the south and west of tract A. It is bounded on the
East by tract B. The John Smith land, which is located

on the plat as "Tract C," is located west of appellant's tract. There is a private lane running substantially in a northerly and southerly direction across the Huber tract from the John Huber residence to the public county road.

The stipulation further recites that the appellant, in 1951, purchased his ten-acre tract (Tract A) from a Mr. Burk and made an agreement with the then owner of Tract B to obtain a right-of-way across Tract B; that before the easement across Tract B could be granted, the owner of this tract sold it to Walter Maacks; that Walter Maacks refuses to grant an easement across his land to appellant except at a price of \$2000.00; that Tract C, ~~the Huber tract,~~ and the private lane belong to John Huber and he, Huber, refuses to grant petitioner an easement at any price; that this private lane was used for many years as a means of entry to Tract A, but its use was always with the permission of the owner of Tract C and the owner of Tract C maintained a gate at the entrance of the lane; that appellant's ten-acre tract, being the land for which he seeks a means of ingress and egress, is improved with a dwelling house and is isolated from a public road and is without means of ingress and egress. The stipulation further recited that the appellant filed his petition with the Commissioner of Highways under the authority of Chapter 121, Paragraph 105, of the Illinois Revised Statutes; that a hearing was held on this petition and the prayer thereof denied and that he thereupon appealed to the County Superintendent of Highways as authorized by statute and a hearing was again held on his petition and again denied. It was also stipulated that appellant stands ready to pay and has offered to pay the entire cost of the road and that he has complied with all

on the lot as Tract C, located west of the railroad
tract. There is a private lane running eastwardly in
a northerly and southerly direction across the upper tract
from the John Huber tract to the public county road.
The subdivision further recites that the applicant,
in 1921, purchased the two-acre tract (Tract A) from a Mr.
Burt and made an agreement with the then owner of Tract B
to obtain a right-of-way across Tract B; that before the
subdivision across Tract B could be completed, the owner of
this tract sold it to John Huber; that latter Huber
refused to grant an easement across his land to applicant
except at a price of \$5000.00; that John Huber, and the
and the private lane running to John Huber and the Huber,
refused to grant petitioner an easement of any kind; that
this private lane was used for many years as a means of entry
to Tract A, but the use was always with the permission of
the owner of Tract B and the owner of Tract C and the same
gate as the entrance of the lane; that applicant's two-acre
tract, being the land on which is shown a record of adverse
and adverse, is improved with a dwelling house and is located
from a public road and is without means of ingress and egress.
The subdivision further recites that the applicant filed his
petition with the Commissioner of Highways under the authority
of Chapter 124, Paragraph 103, of the Illinois Revised Statutes;
that a hearing was held on this petition and the proper report
was filed and that he thereon appeared as the legally qualified
of Highways as authorized by that act and during the hearing
his on his petition was again denied. It was also stipulated
that applicant cannot reach to any and was obliged to pay
the entire cost of this road and that he has complied with all

the statutory requirements relative to the filing of a proper petition.

The State's Attorney, on behalf of appellee, filed an answer to the petition for mandamus in which he neither admitted nor denied the material allegations thereof. He did ask, however, that the petition for the writ be denied and that the petition be dismissed. In this court he has not filed any brief, but a typewritten statement that appellee "will abide by whatever decision the court sees fit to make."

Paragraph 105, Chapter 121, Illinois Revised Statutes, 1955, under which appellant states he is proceeding, provides as follows: "Roads for private and public use of the widths of three rods or less may be laid out from one or more dwellings or plantations to any public road, or from one public road to another, or from one or more lots of land to a public road or from one or more lots of land to a public waterway, on petition to the commissioner by any person directly interested. Upon receiving such petition, proceedings shall be had respecting the laying out of such road as in the case of public roads. In case the commissioner of highways or upon appeal, the county superintendent of highways shall enter a preliminary order for the laying out of such road, the said highway officer or officers making such preliminary order shall, if possible, and the parties are competent to contract, agree upon the total amount of damages, together with the portion thereof to be paid by the town or district, if any, as well as by each of the land owners benefited by such private road. ****"

Counsel for appellant states that the only question presented for determination upon this appeal is whether the provisions of this statute are mandatory or discretionary.

The witness, however, relates to the filing of

proper petition.

The State's attorney, on behalf of the State, filed

an answer to the petition for mandamus in which he stated

that he was not aware of the petition for mandamus.

He said, however, that the petition for the writ was denied

and that the petition was dismissed. In this regard he was

not fully correct, but a typographical error in the original

will appear in the next section of the report.

Paragraph 108, Chapter 11, Illinois Revised Statutes,

1905, under which said petition was brought, provides

as follows: "Where for private and public use of the State

or other public use any land or other property is owned

or controlled by any public body, or any public body

is authorized, or from any other source, to acquire or

acquire any land or other property for a public use, or

for the convenience of any person or persons, or

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Counsel insists that the word "may," as used in the statute should be construed and interpreted to mean "shall," recognizing that it is only if the statute is so construed that appellant can maintain this action.

In *Town of Kingston v. Anderson*, 300 Ill. 577, one Clare B. Wilson filed a petition to establish and lay out a roadway from his land across the land of the appellee, Anderson, to a public highway. The Commissioner of Highways allowed the petition and a jury in a justice of the peace court, assessed the damages of Anderson and a judgment was rendered in his favor against petitioner for the amount so assessed and costs. The owner of the land appealed from the judgment to the county court and that court, being of the opinion that the proceeding was for the establishment of a purely private road for the benefit of the petitioner, dismissed the proceeding. From that judgment, the petitioner appealed to the appellate court and the appellate court transferred the cause to the Supreme Court. In affirming the judgment of the county court, the Supreme Court, after referring to the applicable statutory provisions, said (p. 581): "The legislature has no authority to authorize the taking of private property for private use. (*Nesbitt v. Trumbo*, 39 Ill. 110; *Grear v. Crossly*, 40 id. 175.) The authority to take private property against the owner's consent must be for a public use and the statute conferring power to take private property for a public highway must be strictly construed. The exercise of the power must be kept strictly within the statute. (*Funderburk v. Spengler*, 234 Ill. 574; *Hyslop v. Finch*, 99 id. 171.) The statute above quoted does not purport to authorize private property to be taken, against the owner's consent, for a purely

(p. 582) "The statute as it appears in the revision of 1913 and as it existed long prior to that time, contemplated a road for public and private use should be at least in part for the public use and benefit and that the public would bear part of the costs of laying it out and maintaining it. In this case there was no apportionment of the damages between the petitioner and the township. The entire amount of damages ~~XXXXXXXXXXXXXXXXXXXXXXX~~ for the land taken was assessed against the petitioner and, as no order was made apportioning any amount to be paid by the public, it follows he would have to pay the entire amount and, under the proviso of 1919, would be required to pay the cost of constructing and maintaining the road. This seems to us equivalent to finding that no benefit would result to the public from laying out the road and the effect of the 1919 amendments would be to authorize laying out a road for the purely private use and benefit of the person asking for it, if he would pay all damages and construct and maintain it. This it was held in Nesbitt v. Trumbo, supra, and Grear v. Crossly, supra, the legislature could not authorize."

- 6 -

private road for private benefit. It is not a public use, but a private use, for 'roads for private and public use' in the same manner, while roads are laid out and established. Such a road must be of some use and benefit to the public and not for the sole benefit of the individual, otherwise the constitutional requirement that private property can only be taken for public use would be nullified. (p. 502) The statute as it appears in the revision of 1915 and as it existed long prior to that time, contemplated a road for public and private use should be at least in part for the public use and benefit and that the public would bear part of the cost of laying it out and maintaining it. In this case there was no establishment of the road between the petition and the township. The entire amount of the road tax was assessed against the petitioner and no order was made apportioning any amount to be paid by the public, it follows he would have to pay the entire amount and, under the provision of 1915, could be required to pay the cost of constructing and maintaining the road. This seems to be equivalent to finding that no benefit would result to the public from laying out the road and the effect of the 1915 amendments would be to authorize laying out a road for the purely private use and benefit of the person laying it out. It is not possible to construct and maintain it. This it was held in *Washitt v. Trumbull, Turner, and Green v. Green*, supra, the legislature could not authorize. It is true that such a statute was placed in that case on the fact that the petition to lay out the road was the certificate of the commissioner established when it referred

to it as a "private road," but the actual facts in that case are not materially different from those in the instant case. Here, the appellant seeks to have a roadway established to enable him to have access to a public highway and to lay out said road over the land of an adjoining land owner. In his petition, he designates it as a road for private and public use, but the fact remains that the road is to accommodate him and those having business with him, and him alone. We fail to see how the general public will ever make any use of the proposed road or receive any benefit from it.

~~Further~~ ^{Further} it was not sought to assess any damages against the township for the public benefit to be derived from the use of the road, but, instead, appellant offered to pay all of the damages for laying out the road himself. In *Town of Kingston v. Anderson*, supra, the court emphasized the fact that the failure to assess benefits against the township indicated ~~that this was~~ ^{that the purpose} very strongly ^{to show this was} ~~to lay out~~ a private road and not one for private and public use.

Appellant stresses the fact that his premises are isolated and that it is a well-established principle of law that he is entitled to a means of ingress and egress to his property. In other words, that he is entitled to a way of necessity. In *Tiffany, Real Property (Third Edition) Vol. 3, Sec. 793*, at Page 289, the author lays down the rule governing the situation when a land owner is entitled to a way of necessity. He says: "A way of necessity does not, as is sometimes supposed, exist merely by reason of the fact that otherwise one has no access to his land. As above stated, it arises in connection with a conveyance of land by one who retains adjoining land and, consequently, it is necessary,

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in order to establish such a way, to show that at some time in the past the land for the benefit of which the way is claimed and that in which it is claimed, belonged to the same person. It cannot be claimed or acquired over the land of a stranger to the claimant's title. Provided, however, this unity of ownership is shown to have existed, its remoteness either in point of time or by reason of intervening conveyances appears to be immaterial." The case of Banks v. School Directors of Dist. No. 1 of McLean County, 194 Ill. 247, supports the foregoing principle announced by this authority.

So far as this record shows, the land which appellant seeks to take for the roadway which he desires to establish, is the land of a stranger to his title, and, under the law, he has no way of necessity over such land.

Appellant cites a number of cases in which the court has construed the word "may" to mean "shall." There is no doubt that the word "may" has sometimes been construed to mean "shall." We have read the cases cited by appellant, but they throw no light upon the question presented for determination by this record.

The judgment of the trial court was correct and will be affirmed.

Judgment affirmed.

~~Concurs~~
Conaldi J. Concurs
Crow J. Concurs.

IN THE

APPELLATE COURT OF ILLINOIS

FILED

SEP 24 1956

SECOND DISTRICT

JULIUS R. RICHARDSON
CLERK, PROTEMPORE
Appellate Court Second District

May Term, A.D. 1956

11 I.A. 344^{2d}

RUTH AMENDA, Administratrix of
the Estate of Henry J. Amenda,
deceased,

Plaintiff-Appellee,

vs.

GLENN SUITS,

Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
WHITESIDE COUNTY,
ILLINOIS.

DOVE, P. J.

The factual situation disclosed by the evidence in this case is set forth in our original opinion (Amenda, Administratrix, etc. v. Suits, 6 Ill. App. 2d. 395) and in the opinion of the Supreme Court (Amenda, Administratrix etc. v. Suits, 8 Ill. 2d. 598) and need not be repeated.

After reviewing the record the Supreme Court, speaking through the late Mr. Justice Maxwell, said:
"Under such circumstances as indicated by the evidence in this case it is quite understandable that a jury and trial court, who had the opportunity of seeing and observing the witnesses, could reasonably conclude that the defendant was guilty of wilful and wanton misconduct. That reasonable

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CLERK OF DISTRICT COURT

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JULIUS R. RICHARDSON
CLERK PRO TEMPORE
Appellate Court Second District

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| STATE OF CALIFORNIA | PLAINTIFF |
| vs. | |
| JOHN J. RICHARDSON | DEFENDANT |

FILED

The undersigned, Clerk of the District Court of the United States for the District of Columbia, do hereby certify that the within and foregoing is a true and correct copy of the original of the within and foregoing as the same appears in the files and records of the District Court of the United States for the District of Columbia.

Witness my hand and the seal of the District Court of the United States for the District of Columbia, at Washington, D.C., this 24th day of September, 1950.

JULIUS R. RICHARDSON
Clerk Pro Tempore

persons might differ as to this conclusion or that a court of review in weighing the evidence might differ is of no consequence."

In addition to insisting that the trial court should have directed a verdict for the defendant or rendered judgment for the defendant notwithstanding the verdict, the other errors relied upon by appellant for a reversal of the judgment of the trial court and which the Supreme Court directed this court to consider are two. First, it is insisted that the verdict is manifestly against the weight of the evidence and, second, that the trial court refused a proper instruction tendered by the defendant.

The evidence found in this record has been closely examined by the Supreme Court and that court concluded that our former appraisal of the evidence was incorrect and that the finding of the jury was a reasonable one. The controlling issue in the case was whether a jury might reasonably conclude that the conduct of the defendant, as disclosed by the evidence, constituted wilful and wanton misconduct. The jury found it did and the finding of the jury was approved by the trial court and this court cannot now say that such finding is against the weight of the evidence.

It is finally insisted that the trial court erred in refusing to give the following instruction: "The court instructs the jury that in a death action the plaintiff must charge, and the proof must establish, that the wrongful act of the defendant caused the death complained of and not merely that it contributed thereto and if you find from the evidence that the defendant was guilty of wilful and wanton misconduct, but that said misconduct merely contributed to

the death complained of and that the proximate cause of the death was the act or acts of a third party, then you must find for the defendant, Glenn Suits."

This instruction directs a verdict and it is well settled that such an instruction must contain all the facts which authorize the verdict it directs. (Hanson v. Trust Co. of Chicago, 180 Ill. 194, 197). This instruction omits the legal aspect of a concurring cause. Where an injury is the result of the concurrent misconduct of two persons and the accident would not have happened without the misconduct of both, the misconduct of each is the proximate cause of the injury and each is liable. (Gleason v. Cunningham, 316 Ill. App. 286, 291). In the instant case the evidence tends to indicate that the death of plaintiff's intestate was the result of the concurrent action of the defendant and the driver of this Twin City Produce truck. It was, therefore, not reversible error to refuse this instruction. Furthermore, as the opinion of the Supreme Court points out, defendant's motion for a new trial did not specifically set out or particularize any of the refused instructions as required by the Practice Act.

The judgment of the Circuit Court of Whiteside County will be affirmed.

Judgment affirmed.

J. Crow
Concurs
Ewald J. Conners,

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 with the students, and the only ones at a time when they are

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资料来源:根据《中国统计年鉴》(2006)整理。

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A.D. 1956.

FILED

OCT 3 - 1956

JULIUS R. RICHARDSON

CLERK, PRO TEMPORE

Appellate Court Second District

J. EDWIN WAGHORNE, Jr.,
Appellee

-vs-

EDWIN F. HOGSTROM and
MARGARET L. HOGSTROM,
Appellants.

11 I.A.^{2d} 345

Appeal from the

Circuit Court of
Lake County.

CROW, J.

This is an appeal by the defendants Edwin F. Hogstrom and Margaret L. Hogstrom, his wife, from a judgment in favor of the plaintiff, J. Edwin Waghorne, Jr., for \$850.00 in a suit for a real estate broker's commission which the plaintiff contends became due him as a result of the sale of the defendants' home in Mundelein to a Mr. and Mrs. F. M. Sawyer, in November, 1952. The case was tried without a jury.

The plaintiff, a licensed real estate broker, alleged, in substance, in his complaint, as amended, that on July 10, 1952 the defendants listed their home for sale with him and agreed to pay the usual five per cent commission; that he procured the Sawyers as prospective purchasers, showed them the home, and negotiated with them on many occasions up to and including the period within ten days prior to the actual sale to the Sawyers; and that in November, 1952 the defendants sold the home to the Sawyers, but

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JULIUS R. RICHARDSON
CITY PROSECUTOR
Appellate Court, Second District

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THE FOLLOWING IS A SUMMARY OF THE FACTS OF THE CASE AS SET FORTH IN THE PETITION FOR WRIT OF HABEAS CORPUS FILED IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, ON JULY 10, 1950.

THE PETITIONER, JULIUS R. RICHARDSON, WAS BORN [REDACTED] AND RESIDES AT [REDACTED]. HE WAS ARRESTED ON JULY 10, 1950, AND IS CURRENTLY DETAINED IN THE LOS ANGELES COUNTY JAIL.

THE PETITIONER ALLEGES THAT HE WAS ARRESTED WITHOUT PROBABLE CAUSE AND THAT HIS DETENTION IS UNLAWFUL. HE REQUESTS THE COURT TO GRANT HIM A WRIT OF HABEAS CORPUS AND TO ORDER HIS RELEASE FROM DETENTION.

THE PETITIONER FURTHER ALLEGES THAT HE HAS BEEN DETAINED FOR A PERIOD OF [REDACTED] DAYS WITHOUT BEING CHARGED WITH ANY CRIME OR WITHOUT A TRIAL.

THE PETITIONER REQUESTS THE COURT TO GRANT HIM A WRIT OF HABEAS CORPUS AND TO ORDER HIS RELEASE FROM DETENTION.

had failed and refused to pay the plaintiff the commission which became due. The defendants' answer, in substance, admits the listing of the home with the plaintiff, his showing of the home to the Sawyers, the contract to sell to the Sawyers, and the defendants' refusal to pay a commission to the plaintiff. The answer denies the plaintiff's alleged negotiations with the Sawyers, and his alleged procurement of them as prospective purchasers; denies his right to a commission; and alleges that one Thomas Roxworthy, a real estate salesman employed by Baird & Warner, Inc., another broker, was the procuring cause of the sale, and that Roxworthy and his employer were paid the commission for making the sale.

The defendants' theory, contrary to that of the plaintiff, is that the plaintiff was not the procuring cause of the sale.

The material facts are not greatly in dispute. They are, in substance, as follows: In June of 1952, the defendants resided in Mundelein, where they owned the real estate concerned, being their home and a vacant lot adjoining. Mr. Hogstrom was contemplating a possible change of employment to Louisville. The plaintiff learned of the possible change of employment, in June or early July, contacted Mr. Hogstrom, and discussed the listing of the real estate for sale on an exclusive listing basis. Mr. Hogstrom declined to give an exclusive listing but was agreeable to a non-exclusive arrangement. The plaintiff then stated he had a party who might be interested, and obtained permission to bring him to inspect the premises. Mr. Hogstrom agreed to pay a five per cent commission in the event of sale. Price was discussed and Mr. Hogstrom mentioned about \$19,000.00, to the plaintiff. Mr.

had failed and refused to pay the plaintiff the commission which
became due. The defendant, however, is endeavoring, within the
limits of the law with the plaintiff, his attorney or the court
to the contrary, the plaintiff is still to the contrary, and the
defendant, refused to pay a commission to the plaintiff. The
answer denies the plaintiff's alleged allegations with the
lawyer, and the alleged agreement of them as prospective par-
ticipants; denies his right to a commission and claims that one
Thomas Thompson, a well known salesman employed by him, is
entirely independent, and the plaintiff claims of the sale,
and that Thompson and his employer were paid the commission the
same day.

The defendant, however, contends that the plaintiff
is not the plaintiff and not the defendant named in the
sale.

The plaintiff says the sale is illegal. The
sale, in substance, is as follows: In the year 1900, the defendant
resided in Mississippi, where they owned the real estate described,
being there some land a general law relating to the same was then
existing a possible change of ownership to the plaintiff. The
plaintiff learned of the possible change of ownership, in the
month of July, contacted the defendant, and discussed the issue
of the real estate for sale on an exclusive listing basis. The
defendant decided to give an exclusive listing for the property
to a non-resident corporation. The plaintiff then stated he had
a party who might be interested, and offered payment to bring
him to inspect the premises. The defendant agreed to pay a five
per cent commission in the event of sale. This was discussed and
Mr. Thompson contacted about the plaintiff. The

Hogstrom warned the plaintiff not to promise anything to a prospect because his plans were not definite, that he was not sure he would sell.

The Sawyers, the plaintiff's initial prospect, formerly resided in Lombard. Early in June, Sawyer had taken over a drug store in Mundelein and he and the plaintiff had discussed housing accommodations. The plaintiff testified Sawyer told him he was interested in buying a home. Sawyer testified that he met the plaintiff in the drug store about the middle of June and, when asked by the plaintiff if he were interested in purchasing a home, stated he wished to rent because he was financially tied up, that the proceeds of the sale of his home in Lombard, when sold, would be needed to finance the purchase and operation of the drug store in Mundelein. The plaintiff admitted Sawyer did indicate at a later date a greater interest in renting than buying.

The same day of the plaintiff's initial conversation with the defendants, which culminated in his securing the non-exclusive listing for sale of the defendants' realty, the plaintiff brought Mr. Sawyer to the defendants' home, whereupon the defendants met Mr. Sawyer for the first time. Sale was not discussed with Mr. Sawyer at that time. There was no discussion then between Sawyer and the defendants concerning price.

After that visit, the plaintiff was told by Mr. Sawyer that the type of house and location of the defendants' place were fine, but that the question was still whether to rent or buy. The plaintiff told Mr. Sawyer the price of the defendants' place was about \$20,000.00 with the extra lot, and that it could be purchased with or without the adjoining vacant lot. Sawyer thought

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It is not possible to say that the results of the study are not generalizable to other populations. The study was conducted in a specific population and the results may not be applicable to other populations.

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10-11-68

There are 90 million people in the world who are illiterate and

U.S. DEPARTMENT OF COMMERCE

A paper written in 1897 by John D. ...

1940-1941

to the Bureau for a copy of the report of the Bureau of Mines, and

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para. 10. The Commission has not been able to identify any other cases in which the Commission has been asked to consider the impact of the Commission's decision on the rights of the individual concerned.

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it was too high. The plaintiff told Sawyer the regular procedure would be to tender some earnest money and a proposed agreement to purchase, and he could then negotiate with the defendants. The plaintiff then returned to the defendants' home, told them that Sawyer was interested, but that nothing had been talked over, and that Sawyer had a home in Lombard which first would have to be sold.

Shortly thereafter Mr. and Mrs. Sawyer together inspected the defendants' home. The testimony conflicts as to who was present and what was said during that inspection. The plaintiff could not remember any objections on the part of Mrs. Sawyer to the home other than to the kitchen, but she was perturbed about that. However, according to the testimony of Mr. Sawyer, his wife stated positively afterwards that she did not care for the house, voicing several objections, and he said that on numerous occasions thereafter he informed the plaintiff they were not interested in the defendants' home and the deal was off. The plaintiff denied Sawyer's testimony in the latter respect and said the Sawyers never told him they had no further interest in purchasing the property.

The record is silent on any actual negotiations or attempted negotiations by the plaintiff thereafter with either the Sawyers or the defendants on price, other terms, financing, and the like. There is no indication that the plaintiff ever sought to determine what, if any, reduction in asking price the defendants would make, or what Sawyer, if willing to purchase at all, might offer, or how, if at all, any necessary financing could possibly be arranged. Although he says he had numerous discussions

It was too high. The plaintiff said lawyer was willing to-
achieve would be to transfer some amount money and a proposed agree-
ment to purchase, and he would then negotiate with the de-
fendant. The plaintiff then returned to the defendant's house,
told them that lawyer was interested, and then returned and then
called over, and that lawyer had a note in pocket which they
would have to be sold.

Shortly thereafter, Mr. and Mrs. Taylor contacted in-
quired the defendant's house. The defendant's wife said he was
was present and was not willing to sell. The plaintiff
told could not purchase but objection on the part of Mrs. Taylor
to the fact that the defendant had the house and wanted to sell
that. However, according to the testimony of Mr. Taylor, the wife
stated positively afterwards that she did not want the house,
voicing several objections, and he said that on numerous occasions
the plaintiff had been told the plaintiff was not interested in
the defendant's house and the case was off. The plaintiff denied
Taylor's testimony in the latter report, and said the lawyer
never told him that he had further interest in purchasing the
property.

The record is silent on any actual negotiations re-
assigned negotiations by the plaintiff thereafter with either
the husband or the defendant or wife, their father, defendant,
and the wife. There is no indication that the plaintiff ever
sought to introduce money, if any, resulting in sales with the de-
fendant's wife and son, or any father, it being no concern of any
what other, to him, at all, any necessary transaction could
possibly be arranged. Although he says he had numerous discussions

with the Sawyers concerning purchase of the property, and says he saw one or the other of the defendants, mostly Mrs. Hogstrom, several times each month during the period of July to November, the plaintiff's subsequent efforts consisted principally in inquiring of Sawyer on a number of occasions whether or not his Lombard home had been sold. Sawyer told him once in July that the Lombard sale had fallen through. Mrs. Sawyer was dissatisfied with the defendants' kitchen. He told Mrs. Hogstrom on several occasions that the Sawyer situation had not materialized, that they had to sell their home in Lombard before they could make an offer on the defendants' place. The plaintiff continued his requests for an exclusive listing. According to the plaintiff the last time he discussed the matter with Mrs. Hogstrom was between October 16 - 20th, when he told her Sawyer had not yet sold his Lombard home and he (the plaintiff) was not interested in taking the defendants' home unless he had an exclusive listing. The plaintiff testified that at that time Sawyer had not made an offer on the defendants' home, had said he was interested, but wanted to see if the price could not be reduced. Mr. Hogstrom saw the plaintiff only twice before the consummation of the sale, the first time being the initial visit in late June or early July, and the second being a chance meeting in Sawyer's drug store sometime thereafter in the latter part of October or first of November, at which later time the conversation was mostly of a social nature. Mrs. Hogstrom says the plaintiff visited the home several times, asked for an exclusive listing, which she told him only her husband could give; that the plaintiff did not on those visits discuss the possibility of the Sawyers purchasing the home.

After the 1930s movement, the idea of the 1930s, and the
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Approximately four months, July through most of October, passed with no indication from either Sawyer or the plaintiff that any offer to purchase would be forthcoming from Sawyer. Sawyer testified that the plaintiff came to his store at frequent intervals and asked if he was interested in the property, or had reconsidered his refusal to purchase, and that his answer was always no. Sawyer said that the plaintiff eventually became overbearing and that he did not care to talk with the plaintiff. To the best of Sawyer's recollection the plaintiff's last visit with him was near Labor Day, in September. During this period he was trying to rent living quarters in Mundelein; he made no effort to buy, and he had no intention of purchasing the defendants' home from the day Mrs. Sawyer and he had inspected it in early July, until he made up his mind to do so in a conversation with Mr. Roxworthy, of Baird and Warner, Inc. This was about the time the contract to sell was signed in November. Mrs. Hogstrom had talked with Sawyer at his drug store as to whether he was interested in the house and he said no, that he only wanted to rent. She said that up to practically the day of the ultimate sale she was not convinced he was interested in buying.

During this interval, the defendants had purchased a home in Louisville. Mr. Hogstrom had been away from his family in Mundelein since August 15th and wanted them in Louisville before the holidays. No sale of the defendants' Mundelein home was in prospect, although it had been listed, non-exclusively, with a number of brokers in addition to the plaintiff. Mr. Hogstrom returned to Mundelein for a week-end in the latter part of October, and, upon recommendation of a bank, he gave Baird and Warner, Inc., another real estate broker, which had not before had a listing,

approximately 15 years ago, July 1st, 1900, was at
October, passed with no incident from other papers in the
discovery that not only to purchase would be complicated the
paper, but also that the incident was in the state
at present it seems to have been interested in the
project, or had relinquished his interest in the same, and that
his discovery was always on, however said that the scientific work-
ally became uninteresting and that in his own case he was with the
discovery, he was not at all interested in the scientific
work with the man who was then, in September, 1900,
that he was not going to give him any more in the same
he had no other to give, and he had no intention of purchasing
the discovery, but from now on he was not interested in the
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parison with the discovery, at least and that, that
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the discovery had failed with the paper of the day, and he
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the discovery was not at all interested in the discovery in the
1900.

During the interval, the discovery was purchased a
time in 1900, the discovery had been made from the family
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York the discovery, he was at the discovery, but he was
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turned to the state for a period of the state of New York,
and, upon recommendation of a friend, he gave him and the
another well known person, which had not before had a living

and of which Thomas Roxworthy was an employee, an exclusive agency agreement. Mrs. Hogstrom says that immediately after that week-end visit she called the plaintiff and all the other non-exclusively listed brokers and withdrew the listings. The plaintiff denied receiving that phone call and said the defendants never told him to remove their place from his listing.

About a week later Mrs. Hogstrom met Sawyer again at his drug store, where he again asked if they had changed their minds about renting, since he could not buy, and she said that was up to Mr. Hogstrom, and also Baird and Warner, Inc. would have to agree because they now had an exclusive listing for sale. She told Mr. Roxworthy, of Baird and Warner, Inc., of that conversation and that Sawyer was interested in renting.

Mr. Roxworthy then went to visit Mr. Sawyer and tried to interest him in the home. Sawyer indicated he was interested only in renting the defendants' home through the winter months; that his financial resources were definitely limited; that he had his home in Lombard to sell, and, if successful in disposing of it, would have only \$3,000.00 at the most to apply on the purchase of a Mundelein home; that he had just recently purchased the drug store, the holidays were at hand, and he had a lot of stock to pay for. Roxworthy then told Sawyer he had persuaded the defendants to reduce the listing price to \$18,750.00, without the adjoining lot, and that although a mortgage in excess of 50% of the selling price was practically unobtainable, he had an arrangement with a Chicago savings and loan association called a "pledge-loan", which was actually a second mortgage, in effect, requiring the seller's cooperation, and that if he could work out such a plan, a \$3,000.00 down-payment might be sufficient to permit purchase of

and of which Thomas Lawrence was the employer, in various amounts
amounting to \$1,000.00. Thomas Lawrence was also employed by the
and still was called the "Blackbird" and all the other names mentioned
if Thomas Lawrence was employed in the office, the Blackbird was
not mentioned. Thomas Lawrence said that the defendant never told
him to leave that place. He said that
about a year later, Thomas Lawrence was called again at
his work where, where he again said it was not a proper name
which should be used, and he said that he, and the other men
up to the present, had also said it was proper, and would pay to
some amount. They now had no further interest in the case. He
said Mr. Lawrence, of New York and New York, had of that company
him and that company was interested in the case.
The Lawrence firm was in New York, New York, and had
to interest him in the case. Thomas Lawrence was not interested
with in seeing the defendant, but through the other company
that the financial records were definitely finished. He said
his law to be paid to him, and it was necessary to be paid to him,
which was said to him, and he was to be paid to him, and he was
a financial firm; that he had been paid to be paid to him,
which, the defendant was to be paid, and he was to be paid to
pay for. However, when this money was not received, the defendant
to see the law firm, and he was to be paid to him, and he was
not, and was offered a mortgage in excess of \$50,000.00 of the value
of the property, and he was to be paid to him, and he was to be paid to him,
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was to be paid to him, and he was to be paid to him, and he was
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\$5,000.00. The defendant was to be paid to him, and he was to be paid to him.

the defendants' home. Sawyer replied that so far as the down payment was concerned he would be interested, but he would never pay \$18,750.00 for the property, and that he would not pay over \$17,000.00 for any property no matter how good it was. After further discussions, computations, and explanations of the "pledge-loan" financing plan, Sawyer told Roxworthy that if the defendants would consider a sale upon that plan, he would consider making a \$17,000.00 offer.

Roxworthy then discussed the plan with the defendants who requested that he get a definite offer from Sawyer. Roxworthy told Sawyer of the defendants' reaction and Sawyer then discussed the matter with his wife. Sawyer, at that time, had a sale pending on his Lombard home which appeared certain to culminate, but he was short of ready cash at the moment for even an earnest money payment of any appreciable amount. He contacted Roxworthy and they discussed an offer of \$17,000.00, for the house without the adjoining lot, which was finally made in writing early in November, signed by the Sawyers. This was on the basis of a \$200.00 down-payment, \$2,800.00 on closing, and the balance by the "pledge-loan" plan.

Roxworthy took the offer to the defendants, who finally accepted it, provided Roxworthy could arrange the financing. Roxworthy had the property appraised by a Chicago savings and loan association representative, and the sale was completed shortly before Thanksgiving, at \$17,000.00, with the defendants depositing some money with the mortgage lender to work out the "pledge-loan" financing. The defendants paid a broker's commission to Baird and Warner, Inc. and moved to Louisville shortly before Thanksgiving.

[illegible]

In an action by a real estate broker for a commission he must normally prove, *inter alia*, by a preponderance of the evidence that he has sold the property, or procured a purchaser ready, willing, and able to purchase on the sellers' terms, or that the sale was the proximate result of the broker's efforts, or that he was the procuring cause of the sale; a broker is never entitled to a commission for unsuccessful efforts; such a contract is, conventionally, always of the "no cure, no pay" kind: CLAMP et al. vs. HOLLIS et al. (1947) 332 Ill. App. 60; KLYCZEK et al. vs. DUBUQUE FIRE & MARINE INSURANCE CO. (1945) 325 Ill. App. 696 (abst.); MURAWSKA vs. BOEGER (1920) 219 Ill. App. 241. A broker who relies upon an executed contract of sale has the burden to prove affirmatively that the purchaser was induced to enter negotiations which resulted in the purchase through the means employed by the broker for that purpose.

As a general rule, where the transaction which the broker is employed to negotiate, is consummated on the sellers' terms, the broker is entitled to his commission if he is the efficient, procuring, proximate cause of the transaction: GROOME et al. vs. FREYN ENGINEERING CO. (1940) 374 Ill. 113; GLASS vs. LIBERTY NATIONAL BANK OF CHICAGO et al. (1945) 326 Ill. App. 251 (abst.). But if the broker is not the efficient, procuring, proximate cause of the deal as finally consummated, he is not entitled to the commission: TRIS vs. ITHREMAN (1946) 329 Ill. App. 512 (abst.); KLYCZEK vs. DUBUQUE FIRE & MARINE INSURANCE CO., supra; MURAWSKA vs. BOEGER, supra; BAUMGARTL et al. v. WOMAN et al. (1894) 54 Ill. App. 496. Proximate cause, with respect to a broker's right to a commission for a sale of realty, generally

The first of these is the fact that the Commission has not yet received the information it needs to make a final decision on the matter. The Commission is currently in the process of gathering information from the various parties involved in the case, and it is expected that it will be able to make a final decision within the next few months.

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means a sale which is produced without the interposition of an independent intervening agency, not the probable result of the first cause: MURAWSKA vs. BOEGER, supra; BAUMGARTL et al. vs. HOYNE et al., supra.

The fact that a broker initially found or discovered the person who later becomes the purchaser or other contracting party, or first presents such person as a possible contracting party, FRIEND et al. vs. CHARLES W. TRIGGS CO., (1909) 147 Ill. App. 427; or was the first to call that party's attention to the property, DROBNICK et al. v. OLD LINE LIFE INS. CO., (1943) 320 Ill. App. 232; BURNS vs. SULLIVAN (1915) 192 Ill. App. 127, (abst.); SIEVERS vs. GRIFFIN et al. (1883) 14 Ill. App. 63; or first opened discussions and even had some negotiations with him, BURNS vs. SULLIVAN, supra; or first proposed the transaction, BALDINO vs. KADISON (1917) 204 Ill. App. 197 (abst.), does not necessarily make that broker the efficient, procuring, proximate cause of the sale.

Nor is the broker the procuring cause and entitled to a commission merely because he had some discussion with the party who later becomes the purchaser concerning the transaction, where the purchaser is actually induced to purchase by another: BURNS vs. SULLIVAN, supra; the broker must ordinarily bring about an agreement: FRIEND et al. v. CHARLES W. TRIGGS CO., supra; DAY vs. PORTER (1896) 161 Ill. 235. He is not to be deemed the procuring cause merely because he may have influenced the purchase to some extent, - he must be the one who effects the sale or through whose efforts the sale is brought about: WHITE vs. SELLMYER, (1910) 157 Ill. App. 435; COMMERCIAL NATIONAL BANK vs. HAWKINS (1889) 35 Ill. App. 463. A broker is not entitled to compensation where he is not the procuring cause of a sale, but is

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1900 1901 1902 1903 1904 1905 1906 1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718

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merely a cause of causes, some of which are neither the necessary or probable result of what he did: BAUMGARTL et al. vs. MOYNE et al., supra.

Unless there is a contractual provision to the contrary, an owner may employ several brokers, non-exclusively, to sell or lease the same property, and, provided the owner acts in good faith and remains neutral as between the brokers and is guilty of no wrong towards them, he may consummate an ultimate sale or lease transaction with the actual buyer or tenant who is first procured by one of the brokers, without being called upon to decide which of the several brokers was the primary, proximate, procuring cause of the transaction: FRIED et al. v. CHARLES W. TRIGGS CO., supra; CHICAGO TITLE etc. CO. vs. GUILD et al. (1944) 323 Ill. App. 608; DROBNICK et al. v. OLD LINE LIFE INS. CO., supra. The broker who first actually succeeds in bringing about an agreement and in effectuating an actual sale and who is the efficient, procuring cause of the transaction is entitled to the commission, even though another broker may have first spoken of the property or first called the ultimate purchaser's attention to the property and even attempted some negotiating: CHICAGO TITLE etc. CO. vs. GUILD et al., supra; BERGMAN vs. FIRST SWEDISH BUILDING & LOAN ASSOCIATION (1912) 169 Ill. App. 329; COLEMAN vs. STEIN et al. (1943) 320 Ill. App. 136 (abst.); MCQUINE v. CARLSON (1895) 61 Ill. App. 295; GROVE v. ELSINOR APTS., INC. (1942) 315 Ill. App. 492 (abst.). The defendants' listing of this property with the plaintiff was on a non-exclusive basis; he was necessarily thereby on notice they reserved the privilege of contemporaneously selling it themselves, or listing it, as they in fact did, with other

merely a class of persons, none of which are within the scope
of the statute, and the result is that the statute is inapplicable.

THE COURT OF APPEALS.

United States in a constitutional provision to the effect

that, no person shall be deprived of life, liberty, or property,
without due process of law, and, provided the same shall be

not taken and no other right or interest in the property and its

value of no more than \$100,000, no law shall be made which

shall or have the effect of depriving any person of his or her

life, liberty, or property, without due process of law, and

no state shall deprive any person of life, liberty, or property,

without due process of law, and, provided the same shall be

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shall or have the effect of depriving any person of his or her

life, liberty, or property, without due process of law, and

real estate brokers, and that there might be contemporaneously pending negotiations by the defendants or other brokers. The plaintiff, from the beginning, by reason of the type of his listing, was necessarily subject to the risks of competition inherent therein that an actual agreement and sale might be brought to fruition by the defendants or another broker before the plaintiff accomplished such.

There is no question about the manner in which the Sawyers initially met the defendants, or first learned about the defendants' home, or were first shown through it. That was through the plaintiff. However, the plaintiff knew practically from the outset that the Sawyers desired primarily to rent, and not primarily to buy, and he knew the defendants wanted only to sell, not rent. He did not attempt to get the Sawyers and defendants together on any terms of possible sale, as to price, financing, or any other essential features, nor did he seek to bring about any real agreement between them. Whatever the reason may have been, the plaintiff never obtained from Sawyer any tender of any earnest money, or any offer or proposed agreement to buy, at any price, as a prelude to possible negotiations with the defendants, which, as the plaintiff himself aptly told Sawyer, would have been the regular procedure if he wished to negotiate on price. Mr. Hogstrom says that after the initial visit of Sawyer to the place in June or July, and the plaintiff's intermediate discussion with Sawyer, the plaintiff returned to the defendants' place to tell Mr. Hogstrom that "nothing had been talked over". That, with minor qualifications, rather well describes the apparent status of matters so far as the plaintiff is concerned from then on. Nothing, of practical importance, was talked over by or with him by either the Sawyers or the defendants. After the initial

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two showings of the property in late June or early July, the Sawyers evidently lost any small interest, if any, they may have ever had in a sale, and the plaintiff's later efforts seemed only to create in Sawyer a desire to avoid speaking to him. Merely making repeated inquiries of Sawyer as to whether his Lombard home had been sold, being told once in July it had fallen through, discussing with Mrs. Sawyer her dissatisfaction with the defendants' kitchen, frequently telling Mrs. Hogstrom the Sawyer situation had not materialized, and repeatedly asking her for an exclusive listing, do not constitute the conducting of actual, normal sale and purchase negotiations by the plaintiff as to the defendants' place.

When Roxworthy entered the scene, Sawyer's objections to buying, which he at first stated even to Roxworthy, were overcome, due certainly in large part to aggressive salesmanship and successful negotiating tactics. Doubtless a combination of factors, some, of course, fortuitous and for which neither the plaintiff or Roxworthy can claim credit, actually caused Sawyer to purchase the defendants' home, - that is, the failure of Sawyer to rent other living quarters, the successful efforts of Roxworthy in bringing the parties together by negotiation on the important matter of price, (which the plaintiff had made no effort to do) the good prospects, at that particular time, of sale of Sawyer's Lombard home, and, probably the most important single factor, the success of Roxworthy in working out the matter of the "pledge loan" financing arrangement (which the plaintiff had made no effort to do). After all, it is Roxworthy who in last analysis brought to the defendants the earnest money tender and the written, executed, formal offer to buy of the Sawyers, which

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ultimately became the formal contract of sale when Roxworthy persuaded the apparently somewhat reluctant defendants to accept it, and who arranged for this necessary and unusual type of financing which was required. The plaintiff did not do that. From July to November he had never brought any tender of any earnest money, and had never brought about an agreement, even oral, of sale at any price between the Sawyers and the defendants.

The plaintiff may have made an initial, incidental contribution to what ultimately developed to be the final transaction, but he did not set in motion a chain of events, which, without break in their continuity, and without interposition of an independent intervening agency, caused the parties to come to terms. He urges that without his intervention the Sawyers and the defendants might never have met. That is speculative, of course, though it is certainly possible. The contrary is also possible. But meeting, alone, in any event, is not enough. The plaintiff was, therefore, not the efficient, procuring, proximate cause of the sale.

It is, of course, the duty of the trial court to try the issues and determine where the preponderance of the evidence lies. A reviewing court is, and should be, reluctant to disturb the trial court's findings as to factual matters. However, where the findings as to fact matters appear to us to be manifestly against the weight of the evidence we have no alternative except to reverse. We believe the finding that the plaintiff was the efficient, procuring proximate cause of the sale, is against the manifest weight of the evidence, and is contrary to the law.

The judgment is, therefore, reversed and judgment entered here for the defendants.

Corvaldi J. Bonheur
Dove, P.J. concurs

REVERSED and JUDGMENT
ENTERED HERE FOR THE
DEFENDANTS.

DISSEMINATION OF INFORMATION

[illegible]

Insurance will coverages that may be waived after 90 days.

For 50¢ (1st life only), please get 2¢ (1st life) to 10¢ (10th life) to 10¢ (10th life)

Source: U.S. Department of Commerce, Bureau of Economic Analysis, *Survey of Current Business*, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2

Approved by the Board of Directors of the City of New York, January 19, 1910.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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For more information, contact the author at john@johnmccall.com.

559 A

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

Term No. 56-F-2.

Agenda No. 2.

| | | |
|------------------------------------|---|------------------|
| CHARLES BOEKER, Conservator of the |) | |
| Estate of JEROME BOEKER, an |) | |
| Incompetent and Distracted Person, |) | |
| |) | |
| PLAINTIFF-APPELLEE, |) | Appeal from the |
| |) | Circuit Court of |
| vs. |) | Marion County, |
| |) | Illinois. |
| MARILYN GRIGG, Formerly MARILYN |) | |
| WELKER, |) | |
| |) | |
| DEFENDANT-APPELLANT.) |) | |

BARDENS, P. J.

11 I.A.^{2d} 368

This is an appeal from a judgment entered on a jury's verdict in the amount of \$20,000.00 in an automobile negligence action. The alleged errors preserved for consideration on appeal involve rulings on the admission of evidence, the number of plaintiff's instructions and the question of manifest weight of the evidence.

Plaintiff is the father and conservator of his minor son who suffered a depressed skull fracture in a head-on collision of two cars on U. S. 51 several miles south of Centralia in Marion County, Illinois. The son, Jerome, was 14 years of age at the time of the accident and was a passenger.



in a 1940 Chevrolet Coupe driven by a 15 year old friend, Wayland Backs. As a result of the injury, Jerome's mentality was affected to the extent that his father was appointed conservator for him. Since the action was brought by the father as conservator, the defendant was not competent to testify as to events surrounding the accident.

Defendant does not contest the seriousness of Jerome's injury nor its relation to the accident, but urges that the judgment is against the manifest weight of the evidence on the issue of liability. It is undisputed that each car was in its own lane after the accident though the Chevrolet had spun about and was facing in the same direction as defendant's car, a 1952 DeSoto Convertible. The point of impact is, of course, highly disputed, each side contending the other car had crossed over the center line. In considering the weight of the evidence on this issue it will be necessary to set out the material portions of the testimony of both sides.

Plaintiff's case on this issue rested on the testimony of Wayland Backs, the driver of the Chevrolet, and five witnesses who came to the scene after the accident. Backs testified he met Jerome about 11:00 P.M. the night of the accident

in a tavern and restaurant in a neighboring community where they both lived. At about 11:30 they decided to go to Centralia in Back's car. There they went to a tavern about one-half mile from the scene of the accident looking for friends. After buying a soft drink, the boys returned to the car and headed north on Route 51 at about 35 miles per hour. Backs further testified that one car preceded him as they drove north about 100 yards apart. He observed this car meet and pass defendant's southbound car. As defendant's car came within 35 yards of his car he noticed it "drift" across the center line into the northbound lane. Backs remembered nothing after the impact until the next day. The testimony of the other witnesses for the plaintiff developed the following material points: (1) That the debris from the accident was found around both cars; (2) That an unidentified man was observed kicking debris under defendant's car; (3) That about one-half mile north of the collision scene defendant's car came around a curve "at a pretty fast speed" forcing the witness's car off the pavement; (4) That two witnesses observed a liquor bottle containing a colorless liquid on the floor of the DeSoto on the right side.

The defendant's version of the accident was testified to by seven witnesses, one of whom, Marjorie Pitman, was a passenger in defendant's car. This witness testified that at about 10:15 P. M. on the night in question when defendant finished her work as cashier in a drug store she came to the Western Union office where the witness worked and waited for her to finish her duties. At about 11:15 P. M. they drove defendant's car to a restaurant in Centralia for supper. Thereafter, they returned to Defendant's car and began driving south on Route 51 about 25 miles per hour. As they reached the village of Wamac they met two or three cars, the last one of which swung out into the southbound lane as if preparing to pass; that defendant stepped on the brake and swerved to the right but could not avoid the impact. She denied they had forced a car off the highway north of the collision scene, that a bottle was in the car, and that she or defendant had anything intoxicating to drink. She stated that she never used intoxicating liquor and as far as she knew defendant didn't either. The other witnesses testified they had come on the scene after the accident and that (1) the debris seemed to be located principally in front of the DeSoto; (2) that they observed no one kicking debris around; (3) that they did not see a liquor

bottle in defendant's car; (4) that the boys were observed by one witness in a tavern prior to the accident drinking a soft drink and a beer; and that (5) Defendant did not ever use intoxicants. One witness, a garage man, developed the point that if the Chevrolet which was about 1000 pounds lighter than the DeSoto, was going twice as fast as the heavier car, the latter would be stopped at the point of impact.

To arrive at their conclusion as to the point of impact the jury had to choose between the diametrically opposed testimony of the two eye-witnesses. Each side produced other witnesses who testified in corroboration of its version and in contradiction to the other eye-witness. The end result was a tangled web of fact and innuendo from which no manifest weight could be clearly determined. While defendant's evidence thoroughly contradicts much of the plaintiff's case, there was none the less sufficient probative value in plaintiff's version to sustain a verdict once a jury chose to believe his witnesses. The testimony of defendant's witnesses does not by force of numbers or content manifestly refute plaintiff's case; it merely casts a cloud of doubt. This doubt was resolved by the jury in plaintiff's favor and must stand.

The specific error raised by defendant in the trial court's ruling on the admission of evidence relates to testimony as to the presence of a liquor bottle in defendant's car. In our view this situation is not answered by reference to *Moore v. Daydif*, 7 Ill. App. 2d 534, 130 N. E. 2d 119 and *Fox v. Hopkins*, 343 Ill. App. 404, 99 N.E. 2d 363, which state the Illinois rule as to the admissibility of evidence of intoxication in the absence of specific allegations in the pleadings. In this case there was no other evidence submitted by plaintiff which touched on defendant's condition in this respect and defendant's witness categorically denied that a liquor bottle was in the car before the accident. The issue raised is as to the materiality of such evidence standing alone, unsupported by other evidence, direct or circumstantial, as to whether or not defendant was intoxicated. We note from the abstract of the record that the alleged bottle was never found; that the scene of the accident was near a tavern and that many people crowded around the cars within minutes after the accident; that the man who was allegedly observed brushing the bottle out of the car was not produced at the trial nor was his absence explained; and that the testimony on behalf of defendant that she had never had a drink of intoxicating liquor in

her life was uncontradicted.

We have given full consideration to this problem and have concluded that while of course the mere presence of a liquor bottle in a car affords no proof whatsoever of intoxication, it is a fact which may properly be brought to the jury's attention. Whether it is then to be stricken if not connected up by competent evidence of intoxication or to be the basis of an order for a new trial is best left to the discretion of the trial judge. We cannot say as a matter of law that it is per se prejudicial. In this case the presence of any such bottle in the car before the accident was denied by defendant. It is possible that the jury believed this denial and found for the plaintiff on grounds unrelated to the suggestion of intoxication. It may be also that the effect of such evidence was completely destroyed on final argument. In any event the trial judge is in the best position to gauge the prejudicial effect, if any, of this type of evidence. Having considered the matter in the motion for a new trial in the light of the prevailing circumstances of the particular case and decided it adversely to defendant, we are not disposed to interfere with such ruling.

Finally, defendant contends that an excessive number of instructions were given on

plaintiff's behalf. Of the nineteen instructions so given, eleven were either general nonpartisan instructions or standard plaintiff instructions appearing in any negligence case. There is therefore no merit to this contention.

The judgment of the trial court is therefore affirmed.

Culbertson, J., and Scheineman, J. concur.

Publish abstract only.

FILED

MAY 5 - 1956

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Agenda No. 23

Agenda No. 23

IN THE
APPELLATE COURT OF ILLINOIS

— — —

SECOND DISTRICT

— — —

May Term, A. D. 1956

11 LA. 369

WILLIAM ASCHTGEN and
JUNE A. ASCHTGEN.

Plaintiffs-Appellees.

V8.

HYMAN RAFFLE, M. S. RAFFLE and
AARON RAFFLE, a co-partnership
d/b/a Triple Tite Construction
Company,

Defendants-Appellants.

APPEAL FROM THE
COUNTY COURT OF
WINNEBAGO COUNTY,
ILLINOIS.

DOVE, P. J.

In their complaint, as amended, plaintiffs alleged that the defendants were a co-partnership doing business as Triple Tite Construction Company and engaged in the installation and application of roofing and siding upon dwelling houses; that on May 19, 1953, the parties hereto entered into a written contract by the provisions of which the defendants agreed, in consideration of the payment of \$1290.00, to remove the old siding on plaintiffs' home and to furnish all necessary labor and material to reside said property with genuine green vitraside siding, to complete the work and to caulk and seal around all windows and doors.

This written agreement, which was set forth in haec verba in the complaint, as amended, further provided: "The purchaser hereby certifies he has read this agreement, that the meaning thereof has been explained to him, and that he understands it; that there is no understanding between the parties, verbal or otherwise, other than that contained in this agreement."

The complaint, as amended, then alleged that the defendants, pursuant to said contract, installed said vitraside siding on the home of the plaintiffs; that prior to its installation plaintiffs examined the sample of siding and upon such examination no defects were apparent, but that subsequent to its installation the siding cracked, split and curled. It was then alleged that an implied warranty resulted from said sale by sample that the siding would be free from any defect rendering it unmerchantable and that plaintiffs rely on Section 16 (c), Chapter 121½ of the 1953 Illinois Revised Statutes, which provides that there is an implied warranty in a sale by sample that said goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

To this complaint, as amended, defendants filed their motion to strike on the grounds that Section 16 (c), Chapter 121½ of our Statutes is not applicable to the contract set forth in the complaint, as amended, and that the provisions of the written contract set forth in the complaint, as amended, and under which the siding was sold, negatived any implied warranty relative to the siding. The court overruled the motion to strike and the defendants refused to answer and judgment was entered by default against them for the purchase

price of the siding, \$1290.00. To reverse this judgment, defendants appeal.

Our Uniform Sales Act provides that in case of a contract to sell or a sale by sample, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample, if the seller is a dealer in the kind of goods sold. (Ill. Rev. Stat., chap. 121 $\frac{1}{2}$, sec. 16 (c)). This same act also provides that where the buyer of goods supplied under a contract to sell or a sale expressly or by implication makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies upon the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose. (Ill. Rev. Stat., 1951, chap 121 $\frac{1}{2}$, sec. 15).

Counsel for appellants argue that these statutory provisions have no application to this case inasmuch as Section 71 of the Uniform Sales Act provides: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties." Counsel insists that the instant written contract provided that there was "no understanding between the parties, verbal or otherwise, other than that contained in this agreement," and that these words expressly negatived any liability under this contract which would arise by implication, and conclude that the complaint, as amended, does not state a cause of action because it is predicated upon an implied warranty while the written contract of the parties expressly negatives any such implied warranty.

... ..

The Sterling-Midland Coal Co. v. Great Lakes Coal and Coke Co., 334 Ill. 281, cited and relied upon by appellants, was an action for money claimed to be due plaintiff for various quantities of coal sold and delivered to defendant under certain written contracts. The defendant pleaded a set-off to the effect that plaintiff breached these contracts by refusing to accept certain coal screenings tendered by defendant. The defense to this set-off was that the coal tendered was not of the quality required. Upon the hearing the trial court admitted parol evidence tending to show that defendant had warranted the quality of the screenings and that the sale had been made by sample and that the screenings delivered did not comply with the quality as warranted or with the sample furnished. In the trial court the plaintiff recovered and that judgment was affirmed by the appellate court. In reversing these judgments, the Supreme Court said (p.288) that the contracts involved were not incomplete in not specifying the quality of the coal and held that the trial court erred in admitting the parol evidence. In the course of its opinion the court said (p. 288-289): "An examination of the contracts in question shows that they do contain specifications as to the quality of the coal for which the contracts were made. The coal was to be screenings (described in detail) from the stripping property of the Black Servant Coal Company located at or near Elkville, Jackson County. - - - Plaintiff was not compelled to enter into the contracts in question. Had it desired at that time a more specific description of the quality of the coal contracted for, it could have insisted upon the insertion of such specifications in the contract and have refused to enter into the same if such specifications were not inserted. The contract, having contained some specifications as to quality, plaintiff can not now be heard to complain that the contract was not complete in that respect."

In the Sterling-Midland Coal Company case the contracts were complete. They contained detailed specifications as to the quality of the coal and the court stated that the contracts specifically negatived the contention that there were any other understandings or agreements between the parties with respect to the coal which was the subject matter of the contracts. Not so in the instant case. The instant contract specified the sale and application of genuine green vitraside siding, but contained no statement as to the quality of the siding. The facts, circumstances and language used in the instant contract clearly distinguishes it from the contracts involved in the Sterling-Midland Coal Company case.

In Air-Conditioning Corporation v. Honaker, 296 Ill. App. 221, a conditional sales contract covering an air-conditioning system was involved. The written contract contained this language: "There is no agreement, verbal or otherwise, which is not set down herein; no waivers or modifications shall be valid unless written upon or attached hereto." Printed upon the back of the contract under the heading "Terms and Conditions," there was this statement: "There are no warranties, express or implied, made by either the Manufacturer or the Seller other than Manufacturer's Standard Warranty on its own Equipment." The defendant refused to pay for the equipment installed and plaintiff brought suit against him to recover. Upon trial, parol evidence was offered and admitted to show that the plaintiff had represented to the defendant prior to the execution of the contract that the air-conditioning system would function in such a way as to remove smoke and kitchen odors, purify the air and heat the premises. In affirming a judgment for the defendant, the court said that

the contract entered into by the parties was so ambiguous and so incomplete that it was necessary to introduce parol evidence in order to determine its meaning. The court pointed out that the term "air-conditioning" had no well established meaning and, therefore, it was necessary to introduce evidence in order to determine just what the parties meant when they used this term. As we view it, the same thing is true of the term "vitraside siding" as used by the parties to this contract. This term has no well established meaning and there is nothing in the record which would indicate that this is a patent or trade name. The contract between the parties was on a form prepared by the seller and, therefore, it must be construed most strongly against the seller. (Barnett v. Kennedy, 315 Ill. App. 28)

Reading the contract as a whole, as we must, we do not find anything in it that clearly negatives the idea of an implied warranty. We find nothing in the contract between the parties that prevents the application of Section 15 of the Uniform Sales Act above set out. The statement that "The purchaser hereby certifies that he has read this agreement, that the meaning thereof has been explained to him, and that he understands it; that there is no understanding between the parties, verbal or otherwise, other than that contained in this agreement" does not exclude or negate the implication of a warranty that the siding would be reasonably fit for the purpose for which it was being sold. Appellant knew the particular purpose for which this siding was required and the law implied that it would be reasonably fit for that purpose.

The judgment of the trial court is affirmed.

Judgment affirmed.

Edward J. Conners
Eoraldi, J. Conners

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Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

OCTOBER TERM, A. D. 1956

General No. 10059

Agenda No. 1

People of the State of Illinois,
 Plaintiff-Defendant in Error,
 vs.
 Roy W. McConnell,
 Defendant-Plaintiff in Error.

Error to
 County Court of
 Douglas County

111 A. 370^{2d}

ROETH, J.

Plaintiff in Error, Roy W. McConnell, was found guilty by a jury under an information purporting to charge him with the violation of section 253 of Chapter 38, Ill. Rev. St. 1955 which provides:

"Whoever, with intent to cheat or defraud another, designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined, etc."

The indictment is framed on the theory of obtaining signatures to a written instrument.

After verdict plaintiff in error filed a motion for new

Admitted

STATE OF ILLINOIS

THIRD DISTRICT

APPELLATE COURT

OCTOBER TERM, A. D. 1955

Agenda No. 1

General No. 10052

People of the State of Illinois,
 Plaintiff-Defendant in Error,
 vs.
 Roy W. McConnell,
 Defendant-Plaintiff in Error.

Error to
County Court of
Douglas County

111 A. 370

ROETH, J.

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 thing, shall be fined, etc."

The indictment is framed on the theory of obtaining signatures to

a written instrument.

After verdict plaintiff in error filed a motion for new

trial and a motion in arrest of judgment both of which were overruled. The jury's verdict fixed his punishment at confinement in the County Jail for 3 months and payment of a fine of \$500.00. Judgment was entered on this verdict.

The case is before this court on only the common law record. No report of proceedings was filed because of circumstances which we will later refer to. The primary contention of plaintiff in error is that the information is totally insufficient to charge a violation of the statute and that consequently his motion in arrest of judgment should have been sustained.

The information charges that plaintiff in error

"wilfully, knowingly and designedly did falsely pretend to Frank S. Browning and Lucille Browning that by purchasing food from La Roi-Associates, Inc., a corporation, that they, the said Frank S. Browning and Lucille Browning, thereby received a refrigerator, commonly known as a deep freeze, free of charge from said corporation, which said false pretenses were then and there made by the said Roy W. McConnell with the design and for the purpose of inducing the said Frank S. Browning and Lucille Browning to sign and they did sign a certain note, contract and wage assignment in writing, which was in words and figures as follows:

there is then set out in haec verba a totally blank form of a note and conditional sales contract purporting to be signed by Frank S. Browning and Lucille Browning and a totally blank form of wage assignment purporting to be signed by Frank S. Browning and then the information continues --

and the said Frank S. Browning and Lucille Browning, relying upon and believing the said false pretense were thereby induced to sign the note,

trial and a motion in arrest of judgment both of which were over-ruled. The jury's verdict fixed his punishment at confinement in the County Jail for 3 months and payment of a fine of \$500.00. Judgment was entered on this verdict.

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and the said Frank S. Browning and Lucille Browning, relying upon and believing the said false pretenses were thereby induced to sign the note,

contract and wage assignment, by means of which false pretenses Roy W. McConnell, with intent to cheat and defraud Frank S. Browning and Lucille Browning obtained their signatures to the note, contract and wage assignment; whereas in fact the said refrigerator was not free of charge nor a gift to them as Roy W. McConnell, falsely pretended, but the said corporation charged them \$676.25 for the same; and Roy W. McConnell at the time he so falsely pretended knew his pretenses were false."

Plaintiff in error contends first, that where prosecution is for obtaining a signature or signatures to a written instrument by false pretenses, the information must show that the instrument was a valuable one or stated another way, that it is an instrument of apparent legal efficacy exposing the signer to legal liability as soon as signed and second, that the false pretenses charged must relate to a past or existing fact and not to a promise to do something in the future. The People, on the other hand, contend that the important thing is the obtaining of the signature and that the instrument need not be one of value or have legal efficacy; that the information charges a false representation of an existing fact; that, in any event, the defect is one of form only. We regard the determination of the first contention to be decisive of this case.

At the outset we call attention to the prevailing rule in regard to a motion in arrest of judgment. In *People vs. Plocar* 411 Ill. 141, 103 N.E.(2d) 612, the court said:

contract and wage assignment, by means of which false pretenses by W. McConnell, with intent to cheat and defraud Frank S. Browning and Lucille Browning obtained their signatures to the note, contract and wage assignment; whereas in fact the said refrigerator was not free of charge nor a gift to them as Roy W. McConnell, falsely pretended, but the said corporation charged them \$66.25 for the same; and Roy W. McConnell at the time he so falsely pretended knew his pretenses were false."

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"A motion in arrest of judgment will reach defects in an information the same as a motion to quash or as a general demurrer, and in a criminal case a motion in arrest of judgment opens the entire record for examination and reaches any defect apparent therein. (People vs. Goldberg, 287 Ill. 238.) *** If an information or indictment is void, the question whether the indictment or information is totally defective or insufficient to charge the offense is preserved for review by motion in arrest of judgment even though there has been no motion to quash or such motion is not made in apt time. If the information is void it is error to overrule a motion in arrest, and on review the proper order is one of reversal without remanding. People vs. Green, 368 Ill. 242".

Defects of form only, are not reached by a motion in arrest of judgment. Such a motion only questions the sufficiency of an information or indictment as to matters of substance.

No Illinois case has been cited where the precise question as to whether the information must show that the instrument signed was a valuable one or one of apparent legal efficacy was involved. In fact the Illinois cases involving false pretenses in obtaining a signature to a written instrument are few in number. In Kenney vs. Illinois State Journal Co. 64 Ill. App. 39, this court had under consideration the question as to whether a news article which charged false representations in obtaining subscriptions to a book imputed a violation of the criminal code and was therefore libelous. This court there observed:

"A written subscription for or to a book is a written contract to accept and pay for a book when delivered, or upon stated terms and conditions. Black, Law Dictionary, 1131.

"If accepted it becomes a legal obligation,

"A motion in arrest of judgment will reach defects in an information the same as a motion to quash or as a general demurrer, and in a criminal case a motion in arrest of judgment opens the entire record for examination and resolves any defect apparent therein. (People vs. Goldberg, 287 Ill. 238.) *** If an information or indictment is void, the question whether the indictment or information is totally defective or insufficient to charge the offense is preserved for review by motion in arrest of judgment even though there has been no motion to quash or such motion is not made in apt time. If the information is void it is error to overrule a motion in arrest, and on review the proper order is one of reversal without resentence. People vs. Green, 108 Ill. 2d."

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"A written subscription for or to a book is a written contract to accept and pay for a book when delivered, or upon stated terms and conditions. Black, Law Dictionary, 1131. "If accepted it becomes a legal obligation."

and may be enforced in courts of law; is the subject-matter of forgery (People vs. Matt, 34 Mich. 80), and is a 'written instrument' within the meaning of these words as used in the Criminal Code." (Emphasis supplied)

Here is some intimation at least, that the instrument must have some apparent legal efficacy.

In 35 C.J.S. § 27 page 670 it is stated:

"The instrument signed must be such as might possibly cause loss or injury to the person signing it, xxx. The mere obtaining of a signature is not an offense; it is necessary that the signature be attached to some written instrument of value, and that there be a delivery of the instrument, or that the instrument be of such a character as exposes the signer to liability as soon as it is signed."

In an editorial note preceding an annotation in 141 A.L.R.

210 at page 237 it is stated:

"***it seems that the instrument so obtained must be of such a character that the mere obtaining thereof may occasion injury in the legal sense, or give rise prima facie to a legal liability, in order that the mere obtaining of the instrument by fraud may constitute a criminal offense" (See cases following the above.)

In Commonwealth vs. Mirandi 243 Ky. 823, 50 S.W. 2d 13

the court observed:

"It is true that the instrument to which the signature is obtained must be one apparently of legal efficacy, or foundation of legal liability. Cf Robinson vs. Commonwealth, 217 Ky. 129, 288 S.W.1044."

In State vs. Marion 235 Mo. 359, 138 S.W.491 an information

and may be enforced in court of law; as the subject-matter of forgery (People vs. Watt, 3d Mich. 80), and as a "written instrument" within the meaning of those words as used in the Criminal Code." (Emphasis supplied)

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In State vs. Barton 235 Mo. 354, 138 S.W.2d 1041 on 1042

charged false pretenses in obtaining the signature to a deed.

The name of the grantee was not alleged. The court there held that the failure to allege the name of the grantee was fatal, apparently on the theory that without a grantee the deed had no legal effect.

And in Johnson vs. State 76 So. 2d 351 the court held:

"Where the property obtained by a false representation is a written instrument, such instrument should be described sufficiently to enable the court to determine that it possessed legal efficacy and therefore some value. See Langford vs. State 45 Ala 26. This is usually done by setting out the instrument in haec verba, or so much of the legal tenor of the instrument as to definitely identify it and permit the court to ascertain that it creates a legal obligation." (Emphasis supplied).

In the case of Re Payson 23 Kans. 757 the instrument involved was a deed. There the court made the following detailed observations:

"Said section 94 does not pretend to make the mere obtaining of a signature an offense; nor does any other section of the statute do so. The obtaining of a signature to a blank piece of paper, if nothing further were done, would not constitute any offense. Nor would the obtaining of a signature to a deed, or to any other written instrument, constitute an offense, if such written instrument were never delivered. In order that the obtaining of a signature shall constitute an offense, it is necessary that the signature be attached to some written instrument of value, and that the written instrument itself be obtained along with the signature. (Fenton vs. People, 4 Hill 126.) A signature cannot be obtained unless the written instrument to which it is attached is also obtained. The legislature evidently had no thought of a signature being obtained separate from a written instrument.

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In the case of Re Payson, 23 Ala. 257 the instrument involved was a deed. There the court made the following detailed

observations:

"Said section 4 does not pretend to make the mere obtaining of a signature an offense; nor does any other section of the statute do so. The obtaining of a signature to a blank piece of paper, if nothing further were done, would not constitute any offense. Nor would the obtaining of a signature to a deed, or to any other written instrument, constitute an offense, if such written instrument were never delivered. In order that the obtaining of a signature shall constitute an offense, it is essential that the signature be attached to some written instrument of value, and that the written instrument itself be obtained along with the signature. (See People v. Hill, 124 Ala. 126.) A signature cannot be obtained unless the written instrument to which it is attached is also obtained. The latter being evidently had no thought of a signature being obtained separate from a written instrument.

They had the whole matter in contemplation when they enacted the law -- the signature, and the written instrument -- the signature, and the writing above it to make it valuable. Their language is, 'obtain the signature of any person to any written instrument'; and a signature with the writing above it, to make it valuable, may be stolen. All that a deed is, is the signature with the writing above it to make it valuable. Indeed, neither the signature nor the writing would be of any value if they were separated. And both together would be of no value, unless obtained by the party to whom they were apparently executed, or for whom they were apparently designed, or, in other words, unless they were apparently delivered to the party to whom they were apparently executed." (Emphasis supplied)

If any analogy can be drawn from forgery cases, it has often been held that the legal efficacy of the instrument must appear from the face of the instrument or extrinsic facts must be alleged to show such. See Goodman vs. The People, 228 Ill.154 and People vs. Pfeiffer 243 Ill.200.

Finally, it is to be noted that in the second part of Sec. 253 of Chap. 38 Ill. Rev. St. 1955 the things mentioned are things of value, ie., money, personal property or other valuable things. It is reasonable to conclude that the legislature intended that the written instrument be one of value or one having legal efficacy. Were this not true, one could immediately call to mind innumerable instruments which would come within the phrase "any written instrument" and which could not conceivably work any injury to the person signing the same.

We conclude from the foregoing that the instruments set

They had the whole matter in contemplation when they enacted the law -- the signature, and the written instrument -- the signature, and the written above it to make it valuable. Their language is 'contain the signature of any person to any written instrument'; and a signature with the writing above it, to make it valuable, may be attested. All that is said is, as the signature with the writing above it to make it valuable. In fact, neither the signature nor the writing would be of any value if they were separated. And both together would be of no value, unless obtained by the party to whom they were originally executed, or for whom they were originally executed, or, in other words, unless they were specially delivered to the party to whom they were originally executed." (Emphasis supplied)

If any analogy can be drawn from literary cases, it has often been held that the legal efficacy of the instrument must appear from the face of the instrument or extrinsic facts must be alleged to show such. See Goodman v. The People, 225 Ill. 154 and People v. Pfeiffer 243 Ill. 200.

Finally, it is to be noted that in the second part of Sec. 253 of Chap. 48 Ill. Rev. St. 1905 the things mentioned are things of value, i.e., money, personal property or other valuable things. It is reasonable to conclude that the legislature intended that the written instrument be one of value or one having legal efficacy. Here this not true, one could immediately call to mind innumerable instruments which would come within the phrase "any written instrument" and which could not conceivably work any injury to the person signing the same.

It concludes from the foregoing that the instruments set

out in the information do not form the basis for prosecution under the statute referred to, especially in the absence of allegations of extrinsic facts from which a court could determine from an inspection of the information that some legal obligation was incurred by the signing thereof. This, in our opinion is a matter of substance and not of form and renders the information legally insufficient. The motion in arrest of judgment should have been sustained.

As heretofore observed no report of proceedings was filed in this court. One of the grounds assigned for the motion in arrest of judgment (and also in the motion for new trial) is that the court failed to have a court reporter present at the trial during the taking of evidence and that plaintiff in error was prevented from obtaining a report of the proceedings. While we doubt the sufficiency of this point as to the motion in arrest we deem some comment on the basic point advisable.

On the same day the motion in arrest of judgment was filed there was also filed a stipulation between counsel for plaintiff in error and the State's Attorney from which it appears that prior to the trial the State's Attorney wrote one of counsel for plaintiff in error and asked whether he desired to have a court reporter present at the trial; that thereafter before the trial, counsel for plaintiff in error orally advised the State's Attorney that he, as counsel for plaintiff, did not desire to have a court reporter present

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On the same day the motion in arrest of judgment was filed there was also filed a stipulation between counsel for plaintiff in error and the State's Attorney from which it appears that prior to the trial the State's Attorney wrote one of counsel for plaintiff in error and asked whether he desired to have a court reporter present at the trial; that thereafter before the trial, counsel for plaintiff in error orally advised the State's Attorney that he, as counsel for plaintiff, did not desire to have a court reporter present

at the trial; that the State's Attorney then advised the Judge of this conversation. Also filed at the time of filing the motion in arrest of judgment were affidavits of plaintiff in error and his wife. Plaintiff in error by his affidavit says that he did not know that a court reporter was required to take the testimony of witnesses; that he did not waive the presence of a court reporter and that he did not authorize anyone to do so nor did anyone do so in his presence or to his knowledge. The wife of plaintiff in error swears that no reporter was present during the trial.

Provision is made by the statute for the appointment of an official court reporter by the County Judge. (Ill. Rev. St. 1955 Chap. 37 Sec. 330) There is nothing in the record before us that indicates that an official reporter has not been appointed by the County Judge. The duties of such a reporter are set out by Sec. 331 Ill. Rev. St. 1955. Modern legal procedure contemplates a court reporter who shall be present at the trial for the taking and preservation of evidence, and the rulings of the trial judge on matters that are a part of the bill of exceptions or report of proceedings. This is especially true in criminal cases. Conceding, without passing on the question, that a defendant in a misdemeanor case may waive the presence of a court reporter at the trial, we are of the opinion that such waiver should be made in open court so that the same may affirmatively appear of record; that the record

at the trial; that the State's Attorney, when advised the Judge of this conversation, also filed at the time of filing the motion for arrest of judgment were affidavits of plaintiff in error and his wife. Plaintiff in error by his affidavit says that he did not know that a court reporter was required to take the testimony of witnesses; that he did not waive the presence of a court reporter and that he did not authorize anyone to do so nor did anyone do so in his presence or to his knowledge. The wife of plaintiff in error swears that no reporter was present during the trial.

Provision is made by the statute for the appointment of an official court reporter by the County Judge. (Ill. Rev. St. 1953 Chap. 37, sec. 330) There is nothing in the record before us that indicates that an official reporter was not been appointed by the County Judge. The title of such a reporter was set out by Sec. 331 Ill. Rev. St. 1953. Modern legal procedure contemplates a court reporter who shall be present at the trial for the taking and preservation of evidence, and the making of the trial judge on matters that are a part of the bill of exceptions or report of proceedings. This is especially true in criminal cases. Certainly, without passing on the question, that a defendant in a misdemeanor case may waive the presence of a court reporter at the trial, we are of the opinion that even if it were held in some court that the same may affirmatively appear of record; that the record

should show that such a waiver is made by the defendant when fully apprised of his rights and the provisions of the statute pertaining thereto. Without such procedure resort must be made to the unsatisfactory practice of attempting to use affidavits of the parties and their attorneys as to what transpired, what was said, what was inferred, what was meant to be said and a host of kindred subjects.

For the reason that the information is legally insufficient the judgment of the County Court of Douglas County is reversed.

Reversed.

should show that such a waiver is made by the defendant when fully apprised of his rights and the provisions of the statute pertaining thereto. Without such procedure resort must be made to the usual statutory practice of attempting to use affidavits of the parties and their attorneys as to what transpired, what was said, what was inferred, what was meant to be said and a host of kindred subjects. For the reason that the information is legally insufficient the judgment of the County Court of Douglas County is reversed.

Reversed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

October Term, A. D. 1956.

General No. 10074

Agenda No. 7

111A.381

Board of Education of Williamsville
Community Unit School District No.
15 of Logan, Sangamon and Menard
Counties, Illinois, and Williamsville
Community Unit School District No. 15
of Logan, Sangamon and Menard
Counties, Illinois,

Petitioners-Appellants,

vs.

Appeal from
Circuit Court of
Logan County.

Evans E. Brittin, Margaret T. Brittin,
Harry Long, Lucille Long, the County
Board of School Trustees of Logan
County, Illinois, The Board of
Education of Elkhart Community
Consolidated School District No. 264
of Logan, Sangamon and Menard
Counties, Illinois; Elkhart Community
Consolidated School District No. 264
of Logan, Sangamon and Menard
Counties, Illinois; The Board of
Education of Elkhart Community High
School District No. 406 of Logan,
Sangamon and Menard Counties, Illinois;
Elkhart Community High School District
No. 406 of Logan, Sangamon and Menard
Counties, Illinois; E. E. Lukenbill,
County Superintendent of Schools of
Logan County, Illinois; Leonard McCann,
County Clerk of Logan County, Illinois;
Lionel Hodgdon, County Treasurer of Logan
County, Illinois; Russell Pollis, Tax
Assessor of Hurlbut Township, Logan
County, Illinois,

Defendants-Appellees.

Section of Illinois
Geological Survey
Chicago, Illinois

October 20, 1900

Dear Sir:

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the matter of the Illinois Geological Survey. I am sorry that I cannot give you a more definite answer at this time, but I am sure that the matter will be settled soon.

Sincerely,
John G. Thompson

Yours,

John G. Thompson, Secretary of the Illinois Geological Survey, is in receipt of your letter of the 10th inst. in relation to the matter of the Illinois Geological Survey. I am sorry that I cannot give you a more definite answer at this time, but I am sure that the matter will be settled soon.

Very truly,
John G. Thompson

Respectfully,
John G. Thompson

Enclosed for you are

REYNOLDS, J.

This case is a dispute over the proposed detachment of a certain area from one school district and annexation to another. The four defendants, Evans E. Brittin, Margaret T. Brittin, Harry Long and Lucille Long, were landowners who resided in Section Twenty-Seven (27), Township Eighteen (18), North, Range Four (4), West of the Third Principal Meridian, in Logan County, Illinois. This area was part of the Williamsville Community Unit School District No. 15 of Logan, Sangamon and Menard Counties, Illinois. The said defendants petitioned to detach from the Williamsville School District and to attach or annex to the Elkhart Community Consolidated School District No. 264 and the Elkhart Community High School District No. 406, of Logan, Sangamon and Menard Counties. A petition was filed with E. H. Lukenbill, County Superintendent of Schools and ex-officio Secretary of the County Board of School Trustees of Logan County. The said Lukenbill gave proper notice of the filing of the petition and for hearing. On June 6, 1955, a hearing on the petition was held by the County Board of School Trustees of Logan County, and on the same day that board entered an order allowing the prayer of said petition. On June 14, 1955, a copy of said order was served by mail on L. W. Hinton, the County Superintendent of Schools of Sangamon County. All proceedings were under the law governing detachment and annexation of school areas in force at

1. *Salvia*

[illegible]

that time. On July 9th, 1955, the Governor of Illinois signed into law, the law amending the provisions governing detachment and annexation of school areas. Both the old law and the law amending it, defined the orders and decisions of the County Board of School Trustees in matters of this kind as "administrative decisions" as defined in Section 1 of the "Administrative Review Act", and provided that any resident who appeared at the hearing or any petitioner might apply for a review of such decision in accordance with the "Administrative Review Act." Under the old law, as provided in the Administrative Review Act, Chapter 110, Section 4, Illinois Revised Statutes (1953), 35 days was allowed for the commencement of any action of review under the act. Under the law as amended, which amended Section 4B-5 of Chapter 122, Illinois Revised Statutes (1953), and also the provisions of the Administrative Review Act applicable, the time for commencing proceedings for review of the order or administrative decision of the County Board of School Trustees was changed to ten days after a copy of the decision sought to be reviewed was served by registered mail upon the party affected.

This proceeding for review and for an order to declare the action of the County Board of School Trustees of Logan County null and void, for injunctive relief, and for review under the Administrative Review Act, was filed on July 14th, 1955, five days after the new law became effective and 30 days after service of a copy of the decision.

[illegible]

The petition was in two counts, Count I asking to have the order of the County Board of School Trustees of June 6, 1955, declared to be of no force and effect, and asking that the defendants be enjoined from taking any further action in connection with said decision of June 6, 1955. Count II was a prayer for review of the decision by the County Board of School Trustees under the Administrative Review Act. To the petition the defendants filed their motions to dismiss Counts I and II of the complaint, and on November 6, 1955, the Circuit Court of Logan County dismissed Count I of the petitioners' complaint for failure to state a cause of action and dismissed Count II of the complaint on the grounds that the Court had no jurisdiction of the subject matter. From the order of the Circuit Court dismissing the complaint the petitioners-appellants have appealed to this court.

The petitioners are the Board of Education of Williamsville Community Unit School District No. 15, and Williamsville Community Unit School District No. 15 of Logan, Sangamon and Menard Counties, Illinois. The defendants are the four property owners who sought detachment in the first instance, the various county officers of Logan County and the school districts and boards of education of the schools and school districts to which the said four defendant property owners sought annexation.

The petition was in two parts, the first part being in the form of a petition for a writ of habeas corpus, and the second part being in the form of a petition for a writ of certiorari. The petition was filed in the Supreme Court of the United States on the 10th day of June, 1900, and was heard on the 12th day of June, 1900. The Court was composed of Chief Justice William Howard Taft, and Justices John Marshall Harlan, David Brewer, Charles E. Hughes, and Charles D. Sutherland. The Court was divided 5-4 in its decision. The majority opinion was written by Chief Justice Taft, and was affirmed by Justices Harlan, Brewer, Hughes, and Sutherland. The dissenting opinion was written by Justice Brandeis, and was dissented to by Justices Holmes, McKenna, and Lurion. The Court held that the petition for a writ of habeas corpus was properly before the Court, and that the writ should be granted. The Court also held that the petition for a writ of certiorari was properly before the Court, and that the writ should be granted. The Court's decision was affirmed by the United States Supreme Court on the 12th day of June, 1900.

The petitioners' theory of the case is that the decision of the Circuit Court in dismissing both counts of the complaint was erroneous. Their contention is that the Legislature intended and did in effect by the amendatory act of 1955, abate all detachment proceedings then pending before the county boards of school trustees including those proceedings where an order had been entered but had not become final upon the effective date of the amendatory act, except those proceedings pending on appeal in courts of record. Or stated another way, petitioners contend that since the 90 days provided for appeal under the old law had not run out at the time the amendatory act became law, the order of the county board of school trustees abated and was of no force and effect. But in the alternative, petitioners contend, if the proceedings did not abate, then they still have the right to have the matter considered by the Circuit Court under the Administrative Review Act.

In support of their contention that the proceeding to detach abated, petitioners cite a number of school cases. But the cases cited, namely Lincoln High School v. Elliott H. B., 414 Ill. 466, Board of Education v. Rickell, 419 Ill. 98, Holan v. Whitney, 413 Ill. 274 and others, all are cases where action had been taken by the school authority, and an appeal was pending at the time the amendatory law became effective. The law of these cases is well stated in the case

of Dolan v. Whitney, 413 Ill. 274, where that court said:
"We held that the proceeding to change the school boundaries which was pending upon appeal before the State superintendent abated at once when the amendment establishing a different procedure became effective. Our decision was based upon the settled proposition that the unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect, it cannot be granted afterwards, 'even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.'" Citing People ex rel. Eitel v. Lindheimer, 371 Ill. 367, 374. The same situation arose in the case of Lincoln High School v. Elkhart H. S., 414 Ill. 466, and that court held that they must adhere to the principles enunciated in the Dolan v. Whitney case. But the amendatory act of July 9th, 1955, by express terms set out in Section 2 of the act, provided that the provisions of the new act should not affect or impair any suits or petitions for review or complaints pertaining thereto pending in any court of record at the time the act took effect. This language of the act limits appeals to those suits or petitions for review pending in a court of record. On July 9th, 1955, when the amendatory act became the law of Illinois, there was

of Dolan v. Miller, 118 Ill. 2d, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

nothing pending before any court of record. There being no action for review pending in any court of record at the time the amendatory act took effect, the law of the cases cited, Dolan v. Whitney, 413 Ill. 274, Lincoln High School v. Elkhart H. S., 414 Ill. 466, and others, no longer was applicable. And in consequence, the action of the County Board of School Trustees of Logan County, Illinois, became a final order and not appealable.

The right of appeal, the method, the procedure and the time limitations are all procedural in character and are governed by the statutes governing such matters. The right of appeal is not a vested right of any individual or group of individuals, but is a procedural right granted by the legislature and the legislature may by amendment change, modify or repeal such procedural right. In the case of Smolen v. Industrial Commission, 324 Ill. 32, at page 37, it was said; "***the legislature has the right to change the limitation laws of the state with respect to existing causes of action and to change the laws of procedure, and all rights of action must be enforced in accordance with the new procedure, without regard to whether they accrue before or after the change in the law." And in the same case the court also said, in speaking of vested rights, "It is well understood that the legislature has no authority to pass a law impairing the obligation of a contract or depriving a citizen of his property or of any vested right, but there is no vested right in a public law which is not in the nature of

a grant, and however beneficial an act of the legislature may be to a particular person or class of persons or however injuriously they may be affected by its repeal, the legislature clearly has the right to abrogate all legislative acts which are not in the nature of contracts or private grants."

Applying the law of that case to the present case, there can be no serious contention that the petitioners had any vested rights involving the appeal. In the case of City of Chicago v. Industrial Com., 292 Ill. 409, the court there said:

"This court has repeatedly held that the law is well settled that there can be no vested right in any particular remedy, method or procedure, and 'that while the general rule is that statutes will not be ^{so} construed as to give them a retrospective operation unless it clearly appears that such was the legislative intention, still, when the change merely affects the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law, and without regard to whether suit had been instituted or not, unless there is a saving clause as to existing litigation.'" And in this case, there can be no question that the amendment merely affected practice and procedure and that there is no vested right in practice and procedure.

a court, and however limited an act of the legislature may
be to a particular person or class of persons or property,
constitutionally they may be affected by its exercise, the legislature
clearly has the right to change the law in such a way
as not to be in violation of the constitution or private rights."
Applying the law to that case to the present case, there can
be no serious contention that the legislature had any vested
rights involving the subject. In the case of Wright v. Wright
v. International, 193 Ill. 408, the court there said:
"This court has repeatedly held that the law is not entitled
that there can be no vested right in any particular remedy,
method or procedure, and that while the general rule is that
statutes will not be construed so as to give them a retrospective
operation unless it clearly appears that such was the
legislative intention, still, when the change merely affects
the remedy or the law of procedure, all rights of action
will be enforceable under the new procedure, without regard
to whether they accrued before or after such change in the
law, and without regard to whether the law was amended
or not, unless there is a saving clause to the contrary."
"It is true, however, that in some cases, there can be no question
that the amendment merely affected procedure and procedure
and that there is no vested right in procedure and procedure."

The petitioners rely upon the case of Orlicki v. McCarthy, 4 Ill. 2nd 342, but that case, the court after citing a number of cases in which amendatory legislation was held to apply retroactively, said this: "On the basis of the foregoing authorities, it is our judgment that the time limitation amendment should be retroactively applied, on the ground that the legislature so intended, and that it is procedural in character."

In the light of the many authorities in Illinois this court must hold that the rights of appeal and review provided by Section 4B-5 of the School Act, and Section 4 of the Administrative Review Act, as existing on June 6, 1955, were procedural in character and not vested rights. They were public rights granted by the legislature, and the legislature had full authority to change them if it saw fit. And where no appeal has been perfected and no action for review was pending in a court of record at the time the new law went into effect, the order of the county board of school trustees then became a final order and did not abate. Because no appeal was perfected or pending, the new law by limiting the time for appeal to ten days barred any appeal or review. With the ten days as provided by the new law having expired since notice had been sent out, no review can be permitted under the Administrative Review Act.

For the reasons stated, the order of the Circuit Court dismissing Counts I and II of the petitioners' complaint is affirmed.

Affirmed.

Judge Roeth took no part in the consideration of this case.

The Committee have now the honor to acknowledge the receipt of your letter of the 11th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. It is our intention that the same should be given the most careful consideration and that it is our hope that the same will be given the most favorable consideration.

In the event of the above mentioned being the case, the same will be forwarded to the proper authorities for their consideration. It is our intention that the same should be given the most careful consideration and that it is our hope that the same will be given the most favorable consideration.

Very respectfully,
 The President of the Board of Directors

The President of the Board of Directors
 The Secretary of the Board of Directors

Handwritten signatures and notes at the bottom of the page.

671 A

46875

DOROTHY STEVENSON CLARK,

Appellant,

v.

THE TRIBUNE COMPANY, an Illinois
corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

11 I.A. 420^{2d}

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff's action is for libel, based upon an article printed in defendant's newspaper. Defendant's motion to dismiss the complaint for failure to state a cause of action was sustained, the suit was dismissed, and judgment entered against plaintiff, from which judgment plaintiff appeals.

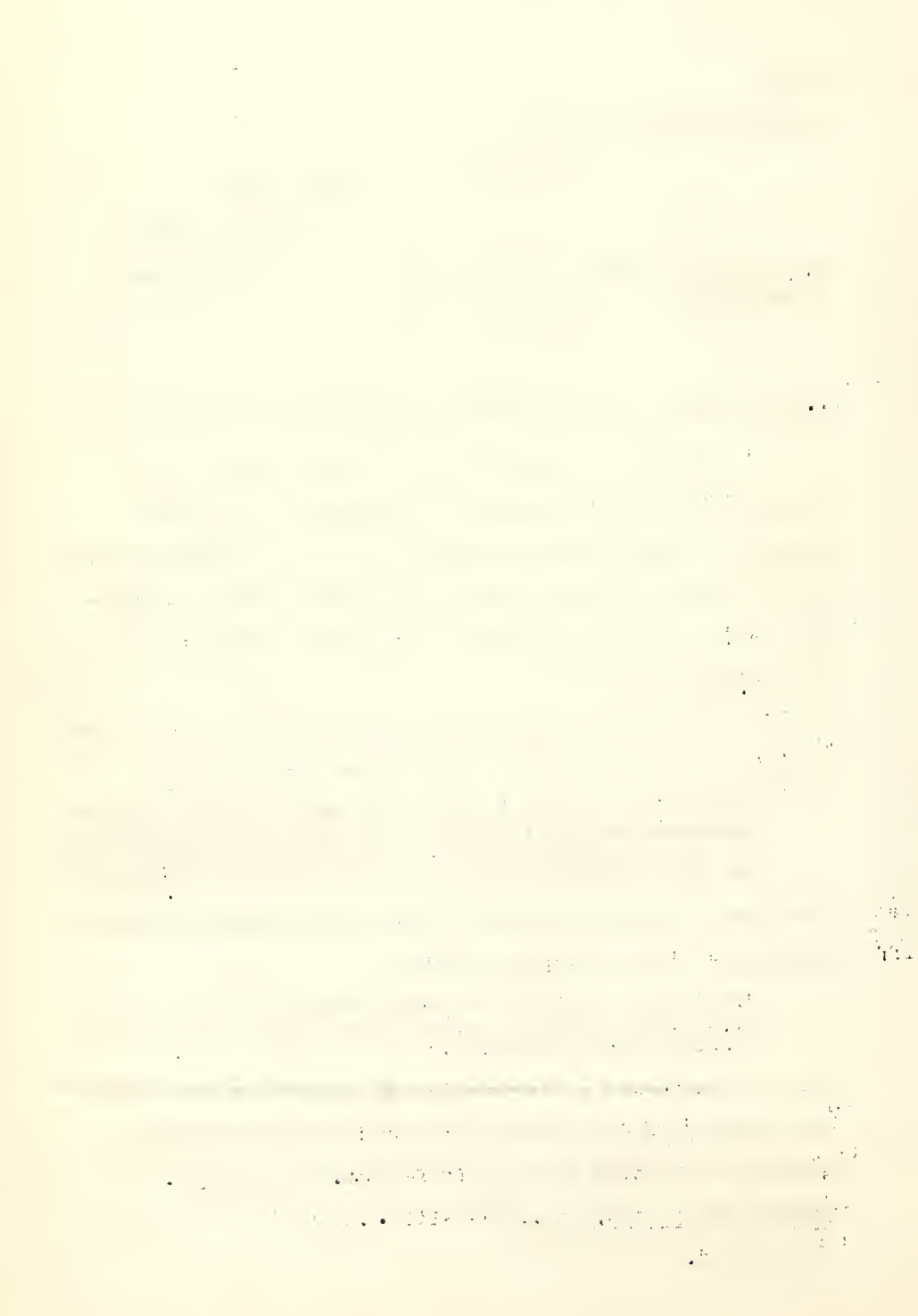
Attached to plaintiff's complaint is a copy of the alleged libelous article. The article in part states:

"Mrs. Clark divorced Clark, who owns the Tower and the Norshore hotels, in 1937 on the ground of infidelity. In the settlement she received his \$50,000 Miami home and the \$150,000 Northbrook estate she now occupies."

That part of the article relied upon, and alleged by plaintiff to be libelous per se, reads:

"In 1935 Mrs. Clark was named defendant in a \$1,000,000 alienation of affection suit filed by Mrs. Morrison Orr of Piqua, O."

There are no innuendoes alleged in the complaint, and whether the statement relied upon is libelous per se presents a question of law for the court. Latimer v. Chicago Daily News, Inc., 330 Ill. App. 295, 298, and cases there cited.



Words alleged to be libelous will receive an innocent construction if they are reasonably susceptible of it. Piacenti v. Williams Press, Inc., 347 Ill. App. 440 (Abst.); Parmelee v. Hearst Publishing Co., 341 Ill. App. 339; Tiernan v. East Shore Newspapers, Inc., 1 Ill. App. 2d 150, 154.

We do not consider the portion of the article relied upon by plaintiff in her complaint as libelous per se. Where the article is not libelous per se, it is necessary that the complaint allege special damages. Mitchell v. Tribune Co., 343 Ill. App. 446; White v. Bourquin, 204 Ill. App. 83. No special damages are alleged in the complaint. The alleged libelous words appearing in the article must be considered in the context of the entire article. Having stated in the article that Mrs. Clark divorced her husband in 1937 on the ground of his infidelity, and received a property settlement in the amount stated, one cannot read the alleged libelous statement as reflecting upon her character involving a violation of the moral law. Plaintiff having obtained a divorce from her husband on the ground of infidelity, an implication follows that she was a good, true, chaste and dutiful wife. Therefore, the statement that in 1935 she was named a defendant in an alienation suit, without being directly charged with having stolen the affection of Mr. Orr, is not susceptible of any such inference as plaintiff claims for the alleged libelous article.

The mere statement that plaintiff was named defendant in an alienation of affection suit is capable of the innocent construction that by persuasion only she alienated the affections of Mrs. Orr's husband, and would not necessarily involve stealing his affections, and a violation of the moral code, as plaintiff argues. There are no innuendoes alleged in the complaint which would allow any meaning other than what the average person would understand by a reading of the entire article. Piacenti v. Williams Press, Inc., supra.

The judgment is correct, and it is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ., CONCUR.

670 A

46827

NELLIE JEFFRIES,

Plaintiff - Appellee,

v.

GEORGE C. ADAMS,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

11 I.A. 420^{2d}

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to remove, as a cloud upon plaintiff's title to real estate, a Contract and Assignment under which plaintiff retained defendant's services as attorney. The issues were referred to a master who recommended a decree for plaintiff. The decree was entered accordingly and defendant appealed to the Supreme Court which transferred the cause here.

The Contract and Assignment, referred to herein as the Contract, was executed October 26, 1942. Under its terms defendant was "to represent me . . . in any pending law suits, negotiate, settle or compromise any and all claims that I may have in and to the property hereafter described" He was also authorized "to do all things necessary to win the law suit or law suits, in the Probate Court, Circuit Court, or Superior Court, and to assist me in a matter pending in the Criminal Court" He was authorized to engage other attorneys to assist him. Plaintiff agreed to pay defendant "a sum equal to one-third (1/3) of any sum or sums that he may recover for me, by suit, settlement or otherwise . . . and I hereby assign, transfer, quit

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claim and set over to . . . Adams, a one-third (1/3) interest in and to the above described real estate" This instrument was recorded July 29, 1948, and the recording was first disclosed to plaintiff in an Opinion of Title dated December 15, 1948.

The issues made by the pleadings are whether defendant did "recover" anything for plaintiff; whether she prevented his recovering anything for her; and whether she had a right to demand his withdrawal as attorney.

The claims and law suits referred to in the Contract arose in connection with a dispute over the property of her deceased husband. The dispute, claims, and litigation were settled between plaintiff and her son. The master found that defendant made no "recovery" for her, and that her settlement and "recovery" were due the efforts of attorney Dotson after she discharged defendant.

It is not denied that Dotson worked out the settlement. But defendant's answer and testimony raise the affirmative defense whether plaintiff did not prevent his "recovery" for her by rejecting several offers of settlement substantially as good or better than the one arranged by attorney Dotson.

We think the master's finding that defendant did not recover anything for plaintiff was not sufficiently specific. Under the terms of the Contract, defendant was empowered to employ attorneys to assist him. He testified he engaged attorney Dotson. Plaintiff testified that she

1. The first part of the document is a list of names and addresses of the members of the committee.

2. The second part is a list of the names and addresses of the members of the committee.

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29. The twenty-ninth part is a list of the names and addresses of the members of the committee.

discharged defendant and employed Dotson. If defendant engaged Dotson, any settlement which gained the real estate for plaintiff would be a settlement by defendant through Dotson. There was no testimony by Dotson.

Furthermore, we think the master should have found specifically on the evidence whether defendant, before Dotson's successful settlement, offered settlements to plaintiff substantially as good, if not better, than the one she eventually accepted. This had a bearing upon whether he was prevented from recovering for her.

There is also the issue with respect to plaintiff's right to discharge defendant. Defendant had the burden of proving his affirmative defense, and if he met the burden any discharge by plaintiff or success by attorney Dotson could not deprive defendant of what is due him. (Goldberg v. Perlmutter, 308 Ill. App. 84, 31 N.E.2d 333.) Plaintiff had the right to discharge defendant at will and engage another but had no right to deprive him of his reasonable fees by replacing him without good cause, making it impossible for him to perform his contract by settling the litigation through another attorney. (Goldberg v. Perlmutter, 308 Ill. App. 84.)

If plaintiff prevented defendant from recovering the property for her either through rejecting a fair settlement offer he had obtained, or by attempting to discharge him, she cannot employ these stratagems to circumvent his right. In view of the lack of sufficient findings with

respect to these issues, we find no sufficient basis for the determination by the master and Chancellor that the Contract and Assignment was null and void.⁴ We need not consider whether the Contract passed any interest in the real estate to defendant. He concedes in this court that the only interest he might have in the real estate was as security for the payment of fees due him.

Defendant filed a counterclaim for fees for services rendered and advances made. The master found that defendant represented plaintiff in "many matters" in the Probate, Criminal, Circuit, and Superior Courts of Cook County, the Appellate Court of Illinois, and the United States District Court and Court of Appeals. No cross error has been assigned and accordingly the finding is undisturbed. The master found he had no right to pass on defendant's counterclaim and we presume that the order of reference to the master did not include the issues made upon the counterclaim.

Should we affirm the decree, the security for the fees and reimbursements due defendant would be removed. We think justice requires that the decree be reversed and the cause remanded to determine what is due defendant under the allegations of his counterclaim. This is no injustice to plaintiff because the record shows no offer on her part to do equity by paying and reimbursing defendant what is due him.

The determination of what is due defendant for fees and advances once made, plaintiff should be given the opportunity to do equity by tendering what is due. Should

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she do so, a decree removing the Contract and Assignment as a cloud ought to be entered. Should plaintiff refuse to tender what is due, her complaint should be dismissed for want of equity.

The decree is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

FEINBERG, P.J. AND LEWE, J. CONCUR.

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|---------------------------|---|-----------------|
| EDNA G. MARSH, |) | |
| Appellee, |) | |
| |) | APPEAL FROM |
| v. |) | SUPERIOR COURT, |
| JOHN M. CHESNEY and |) | |
| WILLIAM LORD HODES, |) | COOK COUNTY. |
| Defendants. |) | |
| |) | |
| On appeal of WILLIAM LORD |) | |
| HODES, |) | |
| Appellant. |) | |

11 I.A. 2d 577¹

JUDGE McCORMICK DELIVERED THE OPINION OF THE COURT.

An action was brought in the Superior Court of Cook County by Edna G. Marsh, plaintiff, against John M. Chesney and William Lord Hodes, defendants, for personal injuries sustained February 6, 1949. The case was tried before a jury. At the close of all the evidence both defendants moved for a directed verdict, which motions were overruled. The jurors returned a verdict finding both defendants guilty and assessing the plaintiff's damages at the sum of \$32,500, upon which verdict judgment was entered. The court denied motions by both defendants for judgment notwithstanding the verdict and the plaintiff's motion for a new trial. The case is before this court on the appeal of defendant Hodes from the ruling of the trial court denying his motion for judgment notwithstanding the verdict. The plaintiff filed notice of cross-appeal from the denial of her motion for a new trial, which cross-appeal she abandoned.

It can be found from the evidence, considered most favorably to the plaintiff, that on February 6, 1949 at the intersection of North and 25th avenues in Melrose

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Park, Illinois, the streets were covered with ice and were very slippery. The weather was cold, windy, with occasional gusts of snow. At approximately 6:45 p.m. an eastbound car driven by one Kowalski was struck by a northbound car driven by one Bokelman when the latter vehicle skidded into the intersection. Kowalski's car was driven over on the shoulder. Bokelman's car remained in the intersection, in the eastbound lane of North avenue, but did not block the eastbound lane. Defendant Chesney, driving a Buick east on North avenue, skidded into Bokelman's car. The bumper-to-bumper contact of the two cars was slight. The lights on the Buick car were off. Defendant Chesney was incoherent and smelled of liquor.

The husband of plaintiff Marsh, driving a Packard car eastbound, slid into the back of the Buick car, making no more than a bumper impact. One Noyce, after the first accident, had parked his car and placed lighted flares back of the Buick car, some of which had burned out at the time of the impact of the Packard with the Buick. Noyce put out more flares. Marsh had just started to back away from the Buick car and had not moved his car more than six inches when it was struck by the eastbound Dodge car driven by defendant Hodes. Hodes' car, as it neared the Packard, was traveling at a speed between 40 and 50 miles an hour. The impact completely caved in the rear of the Packard, forcing it into the Buick and caving in its front. The impact made a loud noise. The personal

injuries received by plaintiff Edna G. Marsh, a passenger in the Packard car, and upon which this suit is based, were received in this last collision.

An appeal taken from the denial of a motion for judgment notwithstanding the verdict presents only a question of law as to whether when all the evidence is considered, together with all reasonable inferences from it, in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case. Merlo v. Public Service Co., 381 Ill. 300. Questions of negligence and proximate cause are ordinarily questions of fact to be decided by the jury. Ney v. Yellow Cab Co., 2 Ill.2d 74. The question we must decide is as to whether or not there is in the record before us sufficient evidence to create a factual question which must properly be submitted for the determination of the jury.

The defendant argues that the evidence clearly shows that the occurrence in question was an unavoidable accident. In Wallis v. Vilanti, 2 Ill. App.2d 146, it is said: "'Unavoidable accident' has been defined by an Illinois court, as 'An accident not occasioned in any degree, remotely or directly, by such want of due care as the law holds every person bound to exercise.'" Callaway v. Spurgeon, 63 Ill. App. 571. While we find no Illinois case directly in point, a number of jurisdictions have held that 'accident' and 'unavoidable accident' are synonymous."

To hold that the occurrence before us was an unavoidable accident would necessitate holding that as a matter of law there was no negligence on the part of the defendant. However, the evidence that the defendant Hodes was driving his car at a speed of 40 to 50 miles an hour at the approach to an intersection, where the road was covered with ice and was slippery, creates a question of fact which properly must be submitted to the jury, both as to the defendant's negligence in running into the rear of the standing car and as to whether such alleged negligence was the proximate cause of the injuries complained of. To hold otherwise would necessitate the conclusion that the defendant Hodes was not negligent as a matter of law, and certainly the evidence is not such that all reasonable men would agree that there was no negligence on his part. On the issue before us as to whether the court properly overruled the motion for judgment notwithstanding the verdict, applying the rule which we have heretofore set out, this evidence considered most favorably to the plaintiff would be sufficient to sanction the court's denial of the motion for a directed verdict and to require the submission of the cause to the jury.

We find no error in the trial court's denial of defendant's motion for judgment notwithstanding the verdict, and the judgment of the Superior Court of Cook County is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.

683 A

APPEAL FROM

CIRCUIT COURT.

V.

COOK COUNTY.

Appellant.

11 I.A. 577²

This appeal by defendant is from a judgment for plaintiff in an action for personal injuries. A trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$5,000. There was also returned a special finding that plaintiff was in the exercise of ordinary care for his own safety immediately prior to and at the time of the occurrence. No point is raised as to the injuries or the size of the verdict.

Plaintiff, ninety-three years of age at the time of the accident, between three and four o'clock in the afternoon, was leaving the Burlington Railroad depot, located on the north side of Burlington Street in LaGrange, Illinois, between LaGrange Road on the east and Ashland Avenue on the west. No cars were permitted to be parked on the north side of Burlington Street in the block in question, and none were parked there at the time of the accident, so that visibility to and from the intersection of LaGrange Road, regulated by traffic lights, was clear.

Plaintiff testified that as he stepped to the curb, leaving the depot, he looked to the east and to the west and saw cars stopped for the traffic light at LaGrange

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Road, which was 200 to 250 feet east of where plaintiff started to cross Burlington Street. He stepped off the curb, and when about 10 feet from the curb on Burlington Street, which is about 45 feet wide, he was struck by the right front fender of defendant's car. He was found lying about 6 to 10 feet west of the front of the automobile. There was other evidence and circumstances tending to support plaintiff's version of the accident.

It appears from the evidence that defendant was familiar with the intersection of LaGrange Road and Burlington Street and the location of the Burlington Railroad depot, having been through that particular area many times before the accident. When defendant started his car after the traffic lights changed to permit him to proceed, there were no cars ahead of him, and his view to the point where plaintiff was crossing Burlington Street was unobstructed.

Defendant contends that the court should have directed a verdict for defendant, because plaintiff was guilty of contributory negligence, as a matter of law, and that there was no evidence of negligence on the part of defendant. Only the evidence and all reasonable inferences to be drawn therefrom, favorable to plaintiff, can be considered upon the motion for a directed verdict. Conflicting evidence cannot be considered. We think the evidence fully justifies the refusal of the court to direct a verdict.

Defendant also contends that the verdict and judgment are contrary to the manifest weight of the evidence;

that the court erred in giving one of plaintiff's instructions, and in refusing to give an instruction tendered by defendant. Defendant argues that plaintiff having undertaken to cross Burlington Street in the middle of the block, not within a marked crosswalk, defendant was, under the circumstances, entitled to the right of way, and offered the following instruction, which the court refused to give:

"The Court instructs the jury that there was in full force and effect at the time and place of the accident in question in this case, a certain statute of the State of Illinois which provided, among other things, as follows:

"Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, shall yield the right of way to all vehicles upon the roadway."

"If the jury believe from the evidence in this case that the plaintiff, while crossing Burlington Street at a point other than a marked crosswalk, or an unmarked crosswalk at an intersection, failed or refused to yield the right of way to the automobile of the defendant and that such failure on his part, if any, was negligent and that such negligence, if any, proximately caused or contributed to cause the accident in question, then your verdict should be for the defendant."

Crossing a busy street in the middle of the block is not negligence per se. King, Adm. v. Ryman, 5 Ill. App. 2d 484; Trennert v. Coe, 4 Ill. App. 2d 166; Parkin v. Ridgon, 1 Ill. App. 2d 586; Hart v. City of Chicago, 315 Ill. App. 214; Ledferd v. Reardon, 303 Ill. App. 300.

The tendered instruction was in the language of subsection (a) of section 75, paragraph 172, Chapter 95-1/2 of the Motor Vehicle Act. Subsection (d) provides:

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"Notwithstanding the provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary * * *."

The tendered instruction was held to be erroneous in view of the language in subsection (d) of the statute, which qualifies subsection (a). Stegall v. Carlson, 6 Ill. App. 2d 388; Paliokaitis v. Checker Taxi Co., 324 Ill. App. 21; Parkin v. Rigdon, 1 Ill. App. 2d 586; Taylor v. Ries, 3 Ill. App. 2d 256.

Defendant complains of an instruction given for plaintiff, which reads:

"You are instructed that at the time and place of this accident, a certain statute of the State of Illinois, provided as follows:

"The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway * * *."

"The Court instructs that if the jury find that the defendant, in the exercise of ordinary care, should have sounded a warning as he operated his automobile at the time and place alleged, but neglected so to do and that as a proximate result of his failure, the accident occurred and plaintiff was injured, then they may find the defendant guilty of actionable negligence."

We think the language in subsection (d), noted above, and the language of section 115, paragraph 212 of the Act, which in part reads:

" * * * The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway,"

and the circumstances disclosed in the evidence justify the giving of said instruction.

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

TO THE SECRETARY OF THE INTERIOR
WASHINGTON, D. C.
FROM THE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT
SALT LAKE CITY, UTAH
SUBJECT: [Illegible]

RE: [Illegible]

1. [Illegible]

2. [Illegible]

Very truly yours,

[Illegible Signature]

cc: [Illegible]

Very truly yours,

[Illegible Signature]

Not only was the verdict and special finding of the jury not against the manifest weight of the evidence, but the evidence on the whole supports the verdict and judgment.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ., CONCUR.

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AUGUST J. DeWULF,

Plaintiff,

B. BROTIME,

Assignee - Appellant,

v.

HYMAN WEINSTOCK,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

11 I.A.^{2d} 578

JUDGE LEWE DELIVERED THE OPINION OF THE COURT.

Appellant B. Brotine, hereinafter called petitioner, as assignee of an alleged deficiency judgment entered in a foreclosure suit, appeals from an order denying her petition to amend and correct a decretal order entered in the original suit.

October 16, 1936, a decree of foreclosure and sale was entered in a suit instituted by August DeWulf, the mortgagee, against Hyman Weinstock, the mortgagor. A sale of the premises involved brought \$4,000. After distribution of the proceeds of sale, there was a deficiency of \$5,875.05. The decretal order here in question approving the report of the sale, which included the deficiency, was entered December 5, 1936. The material portions of that order read,

"4. That the proceeds of said sale were not sufficient to pay the plaintiff the amount found due by said decree, but there was and is a deficiency of . . . (\$5875.05), and that HYMAN WEINSTOCK is hereby found to be personally liable therefor and that execution shall issue thereon for said sum

"5. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, upon motion of the plaintiff that said Special Commissioner's Report of Sale and Distribution and all of the acts and doings of said Special Commissioner as aforesaid, be and the same are hereby approved, ratified and confirmed, and

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that the plaintiff be given a lien upon the rents, issues and profits arising from the full fifteen (15) month statutory period of redemption provided by law for the payment in full of the amount of said deficiency with interest thereon as aforesaid, and that the Court does hereby retain jurisdiction [sic] of this cause and all of the parties thereto until the time of the period of redemption expires."

DeWulf assigned his interest in the alleged judgment to the petitioner in March, 1955. June 28, 1955, petitioner filed her petition asking that an order be entered correcting the decretal order, nunc pro tunc as of December 5, 1936, so as to convert it into a judgment enforceable against Hyman Weinstock.

Weinstock filed an answer averring that it was not the intention of plaintiff or of the court that any deficiency judgment be entered and that the court was without jurisdiction to alter or amend the order of December 5, 1936. After a hearing, the court entered the order here appealed from.

The petitioner's sole contention, as stated in her brief, is that the court had jurisdiction to amend and correct the order in such respect as to make it correspond with what it would have been in order that substantial justice may be done.

Defendant says that the terms of the order are clear and reflect the intention of the court and the parties.

In plain and unmistakable language, the decretal order gave plaintiff DeWulf a lien on the rents, issues and profits for the entire period of redemption "for payment in full of the amount of said deficiency with interest thereon as aforesaid." The record shows that this order was entered

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drawn from it.

3. The third part of the report
describes the measures
taken to improve the
situation and the results
achieved.

4. The fourth part of the report
describes the future
prospects of the country
and the state of the
economy.

5. The fifth part of the report
describes the
conclusions drawn from the
survey and the
measures taken to
improve the situation.

6. The sixth part of the report
describes the
conclusions drawn from the
survey and the
measures taken to
improve the situation.

on plaintiff's motion. Therefore, it is reasonable to assume that all of its terms were satisfactory to plaintiff DeWulf. And since there is no showing that DeWulf made any claim upon Weinstock for the alleged deficiency at any time during the period of redemption or thereafter, or that DeWulf ever made an accounting for the rent, it seems also reasonable to assume that DeWulf accepted the lien on the rents, issues and profits during the period of redemption in full payment of the deficiency.

Petitioner as assignee stands in the shoes of DeWulf and is bound by the latter's actions.

Petitioner relies on The People v. City of Chicago, 363 Ill. 409, and Moore v. Shook, 276 Ill. 47. We find nothing in these authorities to support petitioner's contention in the present case. The People v. City of Chicago, held that the court cannot at a subsequent term amend a judgment except as to matters of form; and then only if the change is based on some note, memorandum or memorial paper remaining in the files or upon the records of the court. In Moore v. Shook, involving a default divorce decree, it was held that the docket notation was sufficient memorandum to warrant a change of date on the divorce decree. The mistake was not judicial, but rather it was clerical or ministerial.

In the case before us, petitioner is not seeking to correct the order appealed from as to a matter of form. What she asks is that a judgment be entered nunc pro tunc as of December, 1936. In short, petitioner seeks to correct an alleged error involving the merits of the case. This cannot be done. (Tosetti Brewing Co. v. Koehler, 200 Ill. 369.)

For the reasons stated, the order is affirmed.

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46931

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
CARL M. SNIVELY and WALTER C. ADAMS,
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT,
OF CHICAGO.

111 A. 2d 579

JUDGE LEWE DELIVERED THE OPINION OF THE COURT.

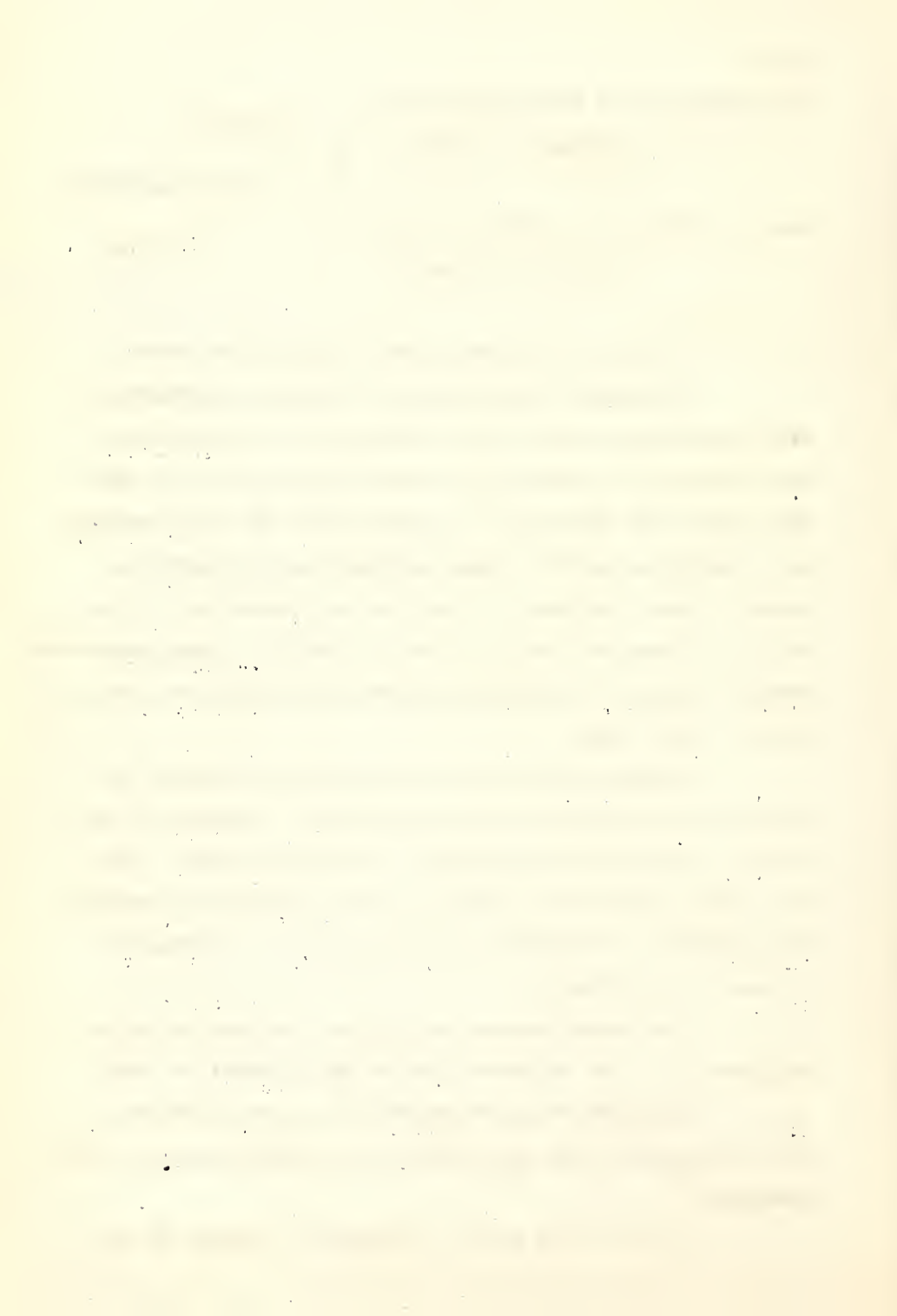
Defendants were charged in separate informations with committing an act of oral copulation in violation of the provisions of Chapter 38, section 159a, Ill. Rev. Stat. 1953 (State Bar Ass'n ed.). A joint trial by jury resulted in a verdict of guilty. Each defendant was sentenced to serve a term of 30 days in the House of Correction in the City of Chicago and to pay a fine of \$300.00. They prosecuted writs of error to the Supreme Court which transferred the cause to this court.

Taken with the case was a motion of Snively to allow certain affidavits and suggestions in support of the motion to stand as an additional abstract and brief. For the reasons hereinafter stated, we feel impelled to reverse the judgments. Therefore no useful purpose is served by ruling on this motion.

The record before us fails to disclose the entry of pleas by either defendant before being placed on trial.

Defendants' major contention is that since no plea was entered, the court was without jurisdiction to enter judgment.

In the early cases of Johnson v. People, 22 Ill.



314, and Hoskins v. The People, 84 Ill. 87, our Supreme Court held that in the absence of a plea, no issue was formed; that without an issue being formed, there could be nothing to try and that therefore the party convicted could not properly be sentenced. (To the same effect, see The People v. Shaffner, 400 Ill. 174; The People v. O'Hara, 384 Ill. 511.)

The People say that by demanding a jury trial and announcing themselves ready, defendants in effect entered a plea of not guilty. In support of their position, they place reliance upon The People v. Terry, 366 Ill. 520, where the plaintiffs in error waived arraignment and entered a plea of guilty. There, plaintiffs in error in support of their claim that they were not properly arraigned cited Yundt v. The People, 65 Ill. 372, and The People v. Kennedy, 303 Ill. 423. The Court said at page 521, referring to the cases last cited, "convictions in those cases were reversed because the record failed to show any plea," and hence had no bearing on the sufficiency of an arraignment. We think that The People v. Terry, relied upon by the People, clearly sustains the contention of defendants.

In the light of these principles and decisions, we think it is unnecessary to consider the other points raised.

For the reasons given, the judgments are reversed and the causes remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

FEINBERG, P.J. AND KILEY, J., CONCUR.

Abstract

General No. 10976

Agenda No. 17

IN THE

APPELLATE COURT OF ILLINOIS

FILED

NOV 5- 1956

SECOND DISTRICT

JULIUS R. RICHARDSON

CLERK, PROTEMPORE

Appellate Court Second District

October Term, A.D., 1956

COMMUNITY UNIT SCHOOL DISTRICT
NO. 1 of MARSHALL, LASALLE
and LIVINGSTON COUNTIES, et al.,

Plaintiffs-Appellants,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES
OF WOODFORD COUNTY, et al.,

Defendants-Appellees.

11 I.A. 579²⁸
APPEAL FROM THE
CIRCUIT COURT OF
WOODFORD COUNTY,
ILLINOIS.

DOVE, F. J.

John F. Manley filed his petition with the County Board of School Trustees of Woodford County and a duplicate thereof with the County Board of School Trustees of Marshall County. This petition recited that petitioner was the sole owner of record in fee simple of one hundred acres of land in LaSalle County, Illinois, and that there were no legal voters or other persons residing in the territory described in the petition and prayed that this land be detached from Community Unit School District No. 108 of Woodford, Marshall, LaSalle and Livingston Counties, referred to in the record as the Minonk School District, and annexed to Community Unit School District No. 1 of

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JULIUS K. RICHARDSON
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Marshall, LaSalle and Livingston Counties, referred to in the record as the Wenona School District. Upon a hearing before the County Board of School Trustees of Woodford County, an order was entered on August 24, 1955, denying the prayer of the petition. Upon a hearing before the County Board of School Trustees of Marshall County, that board, on October 10, 1955, entered an order granting the prayer of the petition.

On November 12, 1955, Community Unit School District No. 1 of Marshall, LaSalle and Livingston Counties, John P. Manley, Mark Healy and William N. Gilman, filed their complaint in the Circuit Court of Woodford County against the County Board of School Trustees of Woodford County, County Board of School Trustees of Marshall County, Community Unit School District No. 108 of Woodford County, LaSalle, Marshall and Livingston Counties, Robert Yates, Robert Oldenburg and Roland Tucker. This complaint, after alleging the action of the County Board of School Trustees of Woodford County on August 24, 1955, denying the prayer of the petitioner to detach and the action of the County Board of School Trustees of Marshall County, on October 10, 1955, granting the prayer of the petition to annex, alleged that the plaintiffs desired a judicial review of said decisions under the Administrative Review Act. The complaint further alleged that the plaintiffs are residents of Community Unit School District No. 1 and that they appeared at the hearings before the county board of school trustees; that the decision of the County Board of School Trustees of Woodford County is contrary to law and contrary to the manifest weight of the evidence in that the evidence shows that the petitioner is the owner of all of the land sought to be detached from Community Unit School District

No. 108 and that there are no legal voters residing in the territory sought to be detached and concluded that the action of the County Board of School Trustees of Woodford County was arbitrary, capricious and unreasonable.

Community Unit School District No. 108, Robert Yates, superintendent of Community Unit School District No. 108, Robert Oldenburg and Roland Tucker answered the complaint and prayed that the prayer of the complaint be denied. The County Board of School Trustees of Woodford County filed a transcript of the record of the proceedings had before it. The Circuit Court, upon a hearing under the Administrative Review Act, affirmed the decision of the County Board of School Trustees of Woodford County. To reverse that order, this appeal is prosecuted.

The record shows that John F. Manley lives in Wenona, Illinois, and owns the one hundred acres of land involved in this proceeding upon which no legal voters or children reside. Except for a short period of time, this one hundred acres had been a part of the Rutland Grade and High School Districts, Rutland being located on Route 51, approximately half way between Minonk and Wenona. This one hundred acres lies one-half mile east and one mile north of Rutland and about four and one-half or five miles from Wenona and seven miles from Minonk.

In the spring of 1955 the Rutland Grade and High School Districts were annexed to the Wenona School District and in June of the same year a portion of the territory so annexed was detached from Wenona School District and annexed to the Minonk School District. The territory, so detached from Wenona and annexed to Minonk, including the land in

question, had an assessed valuation of about 60% of the total valuation of the former Rutland Grade and High School Districts and the territory contained 88% of the student population of the former Rutland Grade and High School Districts.

The Minonk Unit District operates a grade school in Rutland, which serves the grade school students in that area and is available for any students living in the area sought to be detached. There were, in the original Rutland school districts, 105 elementary students and 25 high school students. In that part of the former Rutland school districts ~~xxxxxx~~ ~~xxxx~~ annexed to Minonk in June of 1955, there are 93 elementary school students and 20 high school students.

Counsel for appellants argued before the County Board of School Trustees upon the hearing and in the trial court and it is their contention here that it is the intention of the School Code to permit a land owner to have his land annexed to the territory of a school district of his choice; that "if this were not the case the legislature would have appointed a commissioner to go out and draw the lines themselves. The fact that this county board of school trustees is in existence, evidences the legislative intent to permit the people to go where they desire and it is an abuse of discretion on the part of the board to deny the petition."

In School District No. 79 v. The County Board of School Trustees of Lake County, 4 Ill. 2d 533, it was held that Section 4B-4 of the School Code gave the County Board of School Trustees a standard under which their discretion may be properly exercised in determining whether changes in boundaries of school districts should be made. That section

makes it the duty of the county board of school trustees to hear evidence as to the school needs and conditions of the territory in the area within and adjacent thereto. In the instant case the record shows that the one-hundred-acre tract involved in this proceeding was a part of the former Rutland Grade and High School Districts and that there is now an existing grade school in Rutland serving this area; that there is approximately one hundred pupils attending school in Rutland; that the valuation of the part of the former Rutland Grade and High School Districts annexed to the Minonk School District was 60% of the total valuation of the former Rutland School District while 88% of the total number of students of the former Rutland School District comprised the student population of the area annexed to the Minonk School District and that the cost of ^{rehabilitating} ~~rehabilitating~~ the Rutland School building and equipment by the Minonk School District will be substantial.

The School Code also makes it the duty of the county board of school trustees to hear evidence as to the ability of the districts affected to meet the standards of recognition as prescribed by the Superintendent of Public Instruction. It is conceded that both districts operate good schools and that there is no difference in educational advantages offered by each, counsel for appellants stating in their brief that "No contention is made, that the granting or denying of this petition will have any effect on either district meeting the standards of recognition as prescribed by the Superintendent of Public Instruction." Counsel for appellant also state that there is no problem involved in this proceeding concerning the division of funds or assets between the two districts.

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The applicable provisions of the School Code also requires the county board of school trustees to determine whether it is to the best interest of the schools of the area and the educational welfare of the pupils that such change in boundaries be granted. The Minonk School District operates the grade school at Rutland and this grade school is several miles closer to the tract involved herein than the Wenona Grade School and these matters were proper educational factors to be considered by the county board together with the fact that the land involved herein has always been a part of the Rutland School District and historically has supported the Rutland schools. The county board of school trustees also had before it the financial situation of both districts affected by its order, knew that the land involved had an assessed valuation of \$20,200.00 and that the detachment would result in a tax loss to the Minonk District. These matters, together with the fact that there are no pupils residing in the territory involved, were proper and pertinent for the board to consider and, having done so, concluded that the prayer of the petition should be denied.

The Administrative Review Act provides that "the findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." (Ill. Rev. Stat. 1955, chap. 110, par. 274, sec. 11). The changing of boundaries of a school district is a legislative act, and in performing this function, the county board of school trustees is acting as agent of the legislature. (People v. Deatherage, 401 Ill. 25). This court is not called upon to substitute its judgment for that of the county board of school trustees. Our duty is to read and consider the record in order

to ascertain whether there is substantial evidence to support the order of the county board of school trustees. If there is, its judgment is conclusive. (Stehl v. County Board of School Trustees, 7 Ill. App. 2d 257, 265). The county board of school trustees in the instant case had before it evidence bearing upon the several elements which the School Code provided it should consider and this board concluded that it was for the best interests of the schools of the area and for the best interests of the educational welfare of the pupils to leave this one-hundred-acre tract of land in the Minonk School District. More than personal desires or convenience/is needed to support a board's decision to change established boundaries of a school district. The welfare of the affected districts and their pupils, as a whole, must control rather than the wishes of an individual land owner/~~or a~~ few persons. Such action is taken only where the benefit derived by the annexing and affected areas clearly outweighs the detriment resulting to the losing district and the surrounding community as a whole. (Trico Community Unit School District v. County Board, etc., 8 Ill. App. 2d 494, 497).

Community Unit School District No. 1 v. County Board of School Trustees, General Number 10975, an opinion being this day filed therein was an appeal from a judgment entered by the Circuit Court of Woodford County, affirming orders entered by the Board of School Trustees of Woodford County and by the County Board of School Trustees of Marshall County, which orders denied the prayer of a petition to detach 850 acres of land from Community Unit School District No. 108 (the Minonk District) and annex that land to Community Unit School District No. 1 (the Wenona District). It was there insisted that the

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petitioners were all the legal voters residing in the territory involved, that the territory was contiguous to the Wenona School District, that no children of school age resided within the area and that the respective county boards acted arbitrarily, capriciously and unreasonably in refusing to detach the territory involved from the Minonk District and annex the same to the Wenona District. This court reviewed the record, which is substantially the same as the record in the instant case and called attention to the conceded fact that there was little difference in educational advantages between the two schools and that no evidence was presented by appellants before the county boards of school trustees as to the educational welfare of any of the pupils who might later reside in the area involved. Upon that record we held that more than personal desires and convenience of landowners and taxpayers is needed in order to warrant a change in established school district boundaries and that the welfare of the affected districts and pupils as a whole must control, citing the Trico Community School case, supra.

Parents are definitely interested in the schools their children attend. All their ties and interests may be centered in a certain community and their convenience and their personal desires, as well as the personal desires of the landowner, should be given due consideration by the county boards of school trustees in determining whether the prayer of a petition to detach should be granted or denied. All things being equal, the landowner, the taxes from whose property enables the schools of the district to operate, the parents and students residing in the district, should be permitted to choose the school the pupils should attend. The

agency charged with the responsibility of making this decision in the first instance, determined in the instant case that the land here involved should remain in the Minonk School District and upon this record we are unable to say there is no substantial evidence to support the order of the county board of school trustees.

"We recognize that ~~xxx~~ in all matters concerning a change in school boundaries or annexation to or detachment from territory of an existing school district, certain inequities to individual tax payers will probably arise and disagreement over proposed changes may be present. However, such disagreement cannot be used as a valid argument to overthrow a valid judicial decision of the issues." (School District No. 79 v. County Board of School Trustees of Lake County, 4 Ill. 2d 533, 541).

The judgment of the Circuit Court of Woodford County is affirmed.

Judgment affirmed.

HOVALDI, J., CONCURS

CROW, J., CONCURS

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Intelligence Service in the United States.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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Abstract

Gen. No. 10992

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FILED

NOV 5 - 1956

JULIUS R. RICHARDSON
CLERK, PROTEMPORE
Appellate Court Second District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1956

MATTIE McCARY,

Plaintiff-appellee,

vs.

JOHN WILSON,

Defendant-appellant.

11 I.A.^{2d} 580

Appeal from Circuit Court
of Winnebago County.

BOVALDI, J.

This suit is brought under the Guest Statute which requires proof of the wilful and wanton misconduct of the defendant by the greater weight or preponderance of the evidence. The plaintiff, Mattie McCary, was a guest passenger in the automobile of the defendant when the automobile he was operating was backed into a tree at night, causing a whip-lash injury to the plaintiff's neck and back.

The jury returned a verdict in favor of the plaintiff in the sum of \$3350, and judgment was entered thereon. The jury also answered in the affirmative a special interrogatory submitted by the defendant as follows:

"Does the jury find from a preponderance of the evidence that any one or

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JULIUS R. RICHARDSON
CLERK, PROBATE
Appellate Court Second District

more of the acts or omissions charged against the defendant, John Wilson, constituted wilful and wanton misconduct, as defined in these instructions?"

It is the defendant's theory of the case that there was no evidence of wilful and wanton misconduct on the part of the defendant to go to the jury, and that the trial court should have directed a verdict in his favor at the close of plaintiff's evidence. It is further contended that the verdict of the jury and the answer to the special interrogatory were against the clear and manifest weight of the evidence, and were based upon evidence by the plaintiff which was physically impossible, unreasonable, and inherently improbable, and that the trial court should have granted the defendant's motion for judgment notwithstanding the verdict or for a new trial.

On Saturday night, February 26, 1955, the defendant and his wife, Ann, drove his 1952 Ford automobile, which he had purchased from a used car dealer, from their trailer home to the home of the plaintiff to visit with her; and, while they were there, it was decided that they would go to a movie. The three got into the Wilson car, with the plaintiff on the righthand side in the front seat, Mrs. Wilson in the middle, and defendant driving, and proceeded to the Wilson trailer home which was located behind the house at 3390 9th Street, Rockford, Illinois, to check with the baby sitter before proceeding to the movie. They arrived at the premises at about 8:00 P.M. on a very dark night and with a misty rain falling. The defendant drove his automobile into

the driveway just to the north of the house at 3330 9th Street. He intended to leave the car there and go to the trailer behind the house but, when he got out of the car, he saw that the ground was too wet for the women to go to the trailer, and his wife suggested that he drive the car to the alley south of the house and up the alley close to the trailer. The driveway in which the defendant first stopped was located along the north edge of the two 48-foot city lots upon which the house and trailer were located, and the alley ran east and west along the south side of the two lots. There were no street lights in the vicinity, and there were no curbs on the sides of the street at the point in question. The headlights and windshield wipers were turned on and were working properly. The defendant backed out onto 9th street and backed from the driveway toward the alley to the south and, when the car reached a point near the alley, the rear bumper of the car bumped a tree which was standing just off the level dirt shoulder on the west side of the road, slightly south of the end of the alley. There is a dispute in the testimony as to the speed of the car while it was backing down 9th Street and at the time it collided with the tree, and also a dispute as to whether or not the defendant had the lefthand front door of the car opened and was looking out of same. The defendant and his wife testified that he was backing at a speed of four or five miles per hour, while the plaintiff testified the speed was approximately thirty miles per hour.

The plaintiff also testified that the defendant,

while backing out of the driveway and down 9th Street, was not looking back, but was looking straight ahead. "He just put his car in gear and it seemed that car just jumped and it just went back and just by the time it seemed it started to back it hit the tree. It hit something, at that time he didn't know what he had hit. It seemed like it knocked me out. *** He said he hit a car from behind. Then he got out of the car. *** When he got back in the car, he tried to shut the door and the door wouldn't shut so he got back in the car and set down for a few minutes. When he got hit, it knocked his hat clear into the back by the glass. He had a portable radio back in the glass and it threw it on the floor. *** He had to hold the left front door after the accident with his arm. He held the door continuously up to the time he reached the parking lot at the theater. When he turned around in the street, the door would swing open and he would have to bring it to and he had his arm on the door and holding it with his elbow to hold it to. *** The door wouldn't lock." The evidence disclosed that there was some damage to the car, in that the rear bumper of defendant's car was dented in, about two inches at the point where the impact with the tree would have been made. After the car bumped the tree, the three parties visited for a while in the home of defendant's aunt and then attended a movie, where they remained for the full length of the picture. After the movie, they stopped at a restaurant and a bar, and the defendant and his wife then took the plaintiff to her home. Plaintiff testified that she had complained of being injured during the course of the even-

ing, and that the defendant refused to take her to a hospital. She went to the hospital on the evening of the next day after the accident.

There were differences in the testimony of the defendant and his wife, and the testimony of the plaintiff. The court and jury chose the version of the accident given by the plaintiff. All witnesses testified to the fact that at the time of the accident it was dark, that visibility was poor, that it was drizzling, that the headlights were in good working order, that the windshield wipers were working, and that driving conditions generally were hazardous. The defendant had every opportunity to drive his car in a forward direction, there being no traffic on the street in question on which he backed his car. Each case must depend upon its own peculiar facts to determine whether the act charged is wilful and wanton. Whether an act is wilful and wanton is greatly dependent upon the particular circumstances of each case. It is the peculiar province of a jury to weigh and consider. *Paul v. Garman*, 310 Ill. App. 447. The question whether a personal injury has been inflicted by wilful or wanton conduct is a question of fact to be determined by the jury. *I. C. R. R. Co. v. Leiner*, 202 Ill. 624; *Bernier v. Illinois Central R. R. Co.*, 296 Ill. 464.

Under such circumstances as indicated by the evidence in this case, it is quite understandable that a jury and trial court, who had the opportunity of seeing and observing the witnesses, could reasonably conclude that the defendant was guilty of wilful and wanton misconduct. That reasonable persons might differ as to this conclusion or that a court of review

in weighing the evidence might differ is of no consequence. *Amenda v. Suits*, 8 Ill. 2d 598, 134 NE 2d 811 @ 813. The evidence in this case clearly presented a question for the jury as to the wilful and wanton misconduct of the defendant. By their verdict and by their answer to the special interrogatory, the jury found that the defendant in this case was guilty of wilful and wanton misconduct.

The defendant contends that the jury's verdict and their answer to the special interrogatory were against the manifest weight of the evidence and urges that the trial court should have directed a verdict or granted his motion for judgment notwithstanding the verdict or have granted him a new trial in this matter. On motion for judgment notwithstanding the verdict, or for a directed verdict, the court does not weigh the evidence. The court may properly consider only the evidence and inferences most favorable to the plaintiff; and it is only where there is no evidence tending to prove plaintiff's case that the court can grant either a motion for directed verdict, or judgment notwithstanding the verdict. *Lindroth v. Walgreen Co.*, 407 Ill. 121, 130, 94 NE 2d 847; *Beverly v. Central Illinois Elec. & Gas Co.*, 5 Ill. App. 2d 27, 124 NE 2d 669. It is not the province of this court to substitute its judgment for that of the jury, or to upset the verdict even if it were to reach a contrary conclusion, for that would be invading the constitutional prerogative of the jury. *Bliss v. Knap*, 331 Ill. App. 45, @ 50. We cannot say that the judgment is against the manifest weight of the evidence in this case. For the reasons stated, the judgment is affirmed.

Dove, P. J. Concur

Judgment affirmed.

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Abstract

General No. 10966

Agenda No. 11

FILED IN THE
APPELLATE COURT OF ILLINOIS
NOV 7 - 1956

JULIUS R. RICHARDSON
CLERK, PROTEMPORE
Appellate Court Second District

SECOND DISTRICT

October Term, A.D., 1956

SAMUEL POWEL, DOROTHY S. POWEL,
JOHN W. POWEL, ANN E. POWEL d/e/a
POWEL & POWEL, HARRY F. ESPENSCHEID
and DOROTHY S. ESPENSCHEID,

Plaintiffs-Appellees,

vs.

R. W. KINTOP,

Defendant-Appellant.

111 A. 581^{2d}

APPEAL FROM THE
CIRCUIT COURT OF
WINNEBAGO COUNTY,
ILLINOIS.

DOVE, P. J.

Defendant appeals from a judgment entered against him and in favor of the plaintiffs in the Circuit Court of Winnebago County for \$1178.37 and costs. This judgment grew out of an accounting suit filed by the plaintiffs against the defendant. The defendant had entered into written agreements with the plaintiffs to do some oil drilling work for them. While the proceeding was pending, a firm of accountants made a report concerning the various transactions between the parties. This report showed the plaintiffs owed the defendant \$1050.13. Included in it were claims by the defendant for commissions for finding certain materials needed to carry on the oil drilling work, which claims amounted to \$1009.37. The cause was referred to the master-in-chancery to state an account. The accounting report was received in evidence but the

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master disallowed the claims for commissions for finding the materials in the aforesaid sum of \$1009.37. Objections were filed to the master's report. The Court confirmed the master's report and entered judgment against the defendant for \$1178.37 and costs as heretofore stated.

The only issue raised by this appeal is whether or not the defendant is entitled to credit for his alleged commissions as "finder's fees" for locating and obtaining certain necessary materials to carry on the oil drilling work. The defendant contends his charges for finder's commissions are proper and just and in accordance with the custom and usage of the oil business in the locality involved and, therefore, the Court erred in not allowing him these commissions. The plaintiffs assert the custom and usage relied upon by the defendant was not established by the evidence, and, further, the alleged custom and usage conflicted with the express provisions of the written contract between the parties.

The written agreement entered into between the parties so far as pertinent to this appeal provided:

- "1. Harry Spenscheid (one of the plaintiffs) to pay costs not to exceed \$3500.00 (this includes incidentals too such as permit, survey, etc.).
- "3. That Kintop (the defendant) & Spenscheid to divide completion and operating costs 50/50 with no profit on costs to either party.
- "7. It is agreed that Kintop will make all locations and 'sit' on holes during drilling."

When the defendant became unable to pay his one-half of the costs, he conveyed a one-half interest which he owned in the well being drilled to the plaintiffs, with the understanding that they would pay the balance of the completion costs and give him an option to repurchase the interest which he conveyed to them plus a one-sixteenth working interest in the well. A second written agreement was then drafted and this agreement provided that

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defendant should have \$1000.00 cash for his services on the well then being drilled. He was paid this \$1000.00. The defendant submitted a number of invoices to the plaintiffs for costs and expenses growing out of the drilling operations. These were paid. Later, however, it was discovered the defendant had paid lower prices for the items than those set forth in the invoices and retained the difference for himself, and, also, that he had sold some equipment from one of the wells and had not accounted for the money received to the plaintiffs. This action for an accounting followed. Defendant never sent any statements or invoices to the plaintiffs for his alleged commissions in locating drilling materials. He claimed such commissions for the first time at the hearing before the master. The only testimony in this record relative to the custom and usage which the defendant relies upon is that of the defendant and his son, and is to the effect that it was the general custom in the oil business in Southern Illinois, and particularly in and around Robinson in Crawford County, Illinois, to pay commissions and compensation for "looking up" or "finding" materials. The son testified the commission could be from 10% to 25%. He did not state under what circumstances the commission was charged, who charged such commissions or the locality in which it was charged, and he did not fix a definite amount for the commission but merely stated that it ranged from 10% to 25%. The defendant himself only testified vaguely to the alleged custom and usage relative to a finder's commission.

In *Traff v. Fabro*, 337 Ill. App. 83, it was sought to establish a custom or usage. In holding that the evidence failed to show the custom and usage, the Court said: (p. 87) "A usage or custom to be binding must be so uniform, long-established, and generally acquiesced in, and so well-known, as to induce the belief that the

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parties contracted with reference to it, nothing appearing in their contract to the contrary. (Kelly v. Carroll, 223 Ill. App. 309.)

"Proof of certain isolated instances is not sufficient to establish a usage or custom. (Cleveland, C., C. & ST. L. Ry. Co. v. Jenkins, 174 Ill. 398.) In Bissell v. Ryan, 23 Ill. ⁵⁶⁶/~~xxx~~, the court said: 'It will generally be desirable when a particular usage is relied on, to establish it by the testimony of several witnesses; and if it be a well-established usage, as it ought to be, this will not be difficult.' The rule announced in the Bissell case with respect to proof of a custom or usage has been consistently adhered to by the courts of our State. See Adam Groth & Co. v. Goss & Guise, 232 Ill. App. 450; E. H. Miller Agency, Inc. v. Home Ins. Co., 276 Ill. App. 418."

In Klaub v. Vokoun, 169 Ill. App. 434, an attempt was made to establish a certain custom or usage in the plumbing trade relative to the making of stove connections. In holding that the testimony of the alleged custom or usage was insufficient to establish it, the Court said: ^(p. 438) "Evidence of a custom and usage is not admissible to vary the terms of a contract, but is admitted on the ground that the custom and usage entered into and became a part of the contract, and under the law the contract should be so read and considered. The custom must be shown to have been known to both contracting parties - Corrigan v. Lerrin, 44 Ill. App 363; First Nat. Bank v. Mackey, 157 Ill. App. 404, - or that it was certain, uniform and so general and well known that both parties would be presumed to have knowledge thereof. Currie v. Syndicate, etc., 104 Ill. App. 165; American Insurance Co. v. France, 111 Ill. App. 310. In Bissell v. Ryan, 23 Ill. ⁵⁶⁶/~~xxx~~, the court said: 'The proper office of a custom or usage in business is to ascertain and

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explain the intent of the parties * * * It ought to be proved to be so general, uniform and frequent as to warrant that the party against whom the right is claimed had knowledge of it and contracted with reference to it. * * * All the authorities concur in saying that if usage is relied upon, it must be shown to be ancient, certain, uniform, reasonable and so general as to furnish this presumption of knowledge by both parties."

In *Kelly v. Carroll et al*, 223 Ill. App. 309, the Court said that a custom or usage should be established by the testimony of several witnesses and that since the custom or usage contended for had to be well known, in order for it to constitute a custom or usage, it should not be difficult of proof by a number of witnesses.

We have studied the evidence in this controversy relative to the alleged custom and usage relied upon by the defendant, and it is our opinion it falls far short of establishing the same as required by the foregoing authorities, and many others which could be cited. We have also examined the cases cited by the defendant, but find them inapplicable to the situation here involved.

Furthermore, the written contract between the parties provided they were to share the completion and operating costs on a fifty-fifty basis with no profit on costs to either party. This is a clear and unambiguous statement, and we see nothing in it that would justify us to construe the word "costs" to include a commission. Even if the evidence in this record sustained the alleged custom or usage, it would be inadmissible to alter the terms of the written contract entered into between these parties establishing a certain price. Evidence of custom or usage to alter this price is not admissible. (*Bocher v. Williams*, 341 Ill. App. 504; *Amaram Corp. v. Coal Corp.*, 395 Ill. 154, 164).

The judgment entered herein was correct and is affirmed.

Judgment Affirmed.

Conrad J. Conrad
Convaldi J. Concurr
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James G. Thompson

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